

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 16**

TRIUMPH AEROSTRUCTURES, LLC

and

Cases 16-CA-197912

LAWRENCE HAMM, an Individual

and

16-CA-198055

RODNEY HORN, an Individual

and

16-CA-198410

THOMAS SMITH, an Individual

and

16-CA-198417

**THE INTERNATIONAL UNION, UNITED
AUTOMOBILE, AEROSPACE, AND
AGRICULTURAL IMPLEMENT WORKERS OF
AMERICA, LOCAL 848**

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BRIEF TO THE ADMINISTRATIVE LAW JUDGE**

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This case is about Triumph Aerostructures LLC's (Respondent) failure to bargain with the United Automobile, Aerospace, and Agricultural Implement Workers of America, Local 848 (Union) while the parties were engaged in negotiations for a first contract at Respondent's Red Oak, Texas facility (Red Oak). At issue are two categories of violations.

The first category involves the *Total Security* theory of violation where Respondent failed to provide notice and an opportunity to bargain regarding serious, discretionary discipline of represented employees. Specifically, Respondent failed to provide the Union with notice and an opportunity to bargain over its decision to terminate its employee Thomas Smith in November 2016 and its decision to suspend employee Rodney Horn in April 2017. Counsel for the General

Counsel asserts herein that, under extant law, Respondent violated Section 8(a)(5) by unilaterally discharging and suspending these employees. Counsel for the General Counsel also argues that *Total Security* should be overturned.

As to the second category of violation, Respondent provided notice but failed to bargain in good faith. Specifically, Respondent failed to bargain to impasse or agreement over its decision to lay off twelve bargaining unit employees in its bond shop department at Red Oak, and the effects of that decision, in April 2017.

This Brief will first present a statement of relevant facts and will then establish that Respondent failed to fulfill its bargaining obligation to the Union in the manner addressed above.

I. STATEMENT OF FACTS

A. Respondent's Operations and History

Respondent manufactures aircraft components at various locations, including Red Oak. (GC Exh. 1(s); GC Exh. 1(u)). Prior to the opening of Red Oak, from about 1968 until 2013, the Union represented production and maintenance employees at Respondent's (and its predecessors') facilities in a multi-facility bargaining unit that included its Jefferson Street facility in Dallas, Texas and its Marshall Street facility in Grand Prairie, Texas (J. Exh. Z at 1). Respondent purchased its predecessor, Vought Aircraft Industries, in about 2012 (Tr. 233, LL. 5-11). In 2013, Respondent decided to close its Jefferson Street facility and open a new facility in Red Oak, Texas (J. Exh. Z at 2). On August 1, 2013, Respondent established and implemented initial terms and conditions of employment for its employees at Red Oak, including disciplinary policies and a policy related to reductions in force (J. Exh. Z at 3; J. Exh. A).

The reduction in force policy (RIF policy) provides that when a reduction in force is necessary, Respondent will determine the skills and abilities needed to perform remaining and

future work, determine work units impacted by the reduction, and rate employees based on the necessary skills and abilities (J. Exh. A). The Employer then assigns numerical rankings to each employee and selects employees for layoff starting with the lowest ranked (J. Exh. A). The parties refer to this procedure as the “Rack and Stack” system (RAS) (Tr. 176, LL. 15-25; 177, LL. 1-2; 278, LL. 1-7). The policy also provides that the company will typically notify employees of layoff one week in advance, but at management’s discretion, employees may be notified and released on the same day (J. Exh. A).

In October 2013, Respondent began transferring bargaining unit employees to Red Oak from its Jefferson Street and Marshall Street facilities (J. Exh. Z at 4; Tr. 237, LL. 2-7). Respondent eventually transferred over 500 employees to Red Oak from the other facilities (Tr. 237, LL. 2-11). On January 13, 2014, Respondent recognized the Union as the exclusive bargaining representative of its Red Oak production and maintenance employees and sent a letter to the Union to that effect (J. Exh. Z at 5; J. Exh. A.1; Tr. 237, LL. 12-24). Respondent’s letter proposed meeting to negotiate a collective bargaining agreement to cover bargaining unit employees at Red Oak (J. Exh. A.1). The Union pursued unfair labor practice charges and arbitration advocating its view that the Jefferson/Marshall Street contract should extend to Red Oak employees but was ultimately unsuccessful in those efforts (Tr. 239, LL. 1-9). On December 12, 2014, the Regional Director of Region 16 of the National Labor Relations Board issued a Decision and Order in Case 16-UC-124945, finding that Respondent’s existing Marshall Street unit excluded Red Oak, which constituted a separate, appropriate bargaining unit (J. Exh. A.2).

Red Oak houses mainly assembly and bonding operations for Respondent (Tr. 240, LL. 24-25; 241, LL. 1-11). Employees in the bond shop engage in the production of bonded airplane parts, which includes the cutting, laying, vacuuming, and fabricating of those parts (Tr. 77, LL.

14-23). Employees working in the assembly job family put the airplane parts together or support that function through various tasks such as drilling, riveting, painting, toolmaking, and maintenance (Tr. 77, LL. 24-25; 78, LL. 1-5; 243, LL. 16-19).

B. Union Representation and First Contract Bargaining at Red Oak

From January 13, 2014, to the present, the Union has represented production and maintenance employees at Red Oak. The Union also represented employees at the Jefferson Street location until it closed in March 2014, and at all relevant times, has represented employees at the Marshall Street facility.

During the relevant period, bargaining for the Union was conducted by a president, two successive international representatives, several bargaining committee members, and a note taker. James Ducker was elected Union President in November 2014 and served in that position until June of 2017. (Tr. 61, LL. 19-25; 62, LL. 1-9). Ducker continues to work for Respondent as a toolmaker at Marshall Street (Tr. 60, LL. 24-25; 61, LL. 1-2). As Union President, Ducker was responsible for representation duties over four bargaining units, including the units at Respondent's Marshall Street and Red Oak facilities (Tr. 62, 21-25). When Ducker was first elected President, Wendell Helms was the Union's International Representative over Red Oak, and David Barker took over that position upon Helms' retirement in February 2016 (Tr. 62, LL. 10-20). Ducker and Barker were both involved in bargaining with Respondent for a first collective bargaining agreement at Red Oak, which commenced on May 18, 2015 (Tr. 63, LL. 15-21; 175, LL. 13-17; J. Exh. Z at 9). Members of the Union's negotiating committee included Red Oak employees Adam Rondon, Corey Gregg, Jimmy Ricks, Tommy Bulin, and Richard Guerra, and notetaker Lindsay Portier (Tr. 63, LL. 22-25; 64, LL. 1-7).

Respondent was represented at negotiations by Human Resources Director Danielle Garrett, Human Resources Manager Norm Porter, and Human Resources employees Jorge Gil and Wendy Bailey (Tr. 64, LL. 8-24; 233, LL. 12-21). While the parties were engaged in bargaining, Garrett and Ducker communicated via email and occasionally via text message (Tr. 64, LL. 25; 65, LL. 1-16). The parties ultimately reached a first contract on March 24, 2018 (J. Exh. Z at 37; J. Exh. Y).

C. Correspondence Regarding Discipline at Red Oak

An understanding of the history of the changes to law is necessary to contextualize the facts at issue, and that history is briefly reviewed herein. When Respondent first recognized the Union as the exclusive bargaining representative of its Red Oak unit employees, the Board's decision in *Alan Ritchey*, 359 NLRB 369 (2012) was the leading authority as to an employer's obligation to bargain about discipline in situations where the union represented employees but where a collective bargaining agreement was not yet in effect. However, the validity of *Alan Ritchey* was already questionable in light of *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013). *Alan Ritchey* was later invalidated on procedural grounds on June 24, 2014 in *NLRB v. Noel Canning*, 573 U.S. 513 (2014). Thereafter, the General Counsel sought to revive the precedent of *Alan Ritchey* through a new case, which efforts culminated in the Board's decision in *Total Security*, 364 NLRB No. 106 (Aug. 26, 2016). *Total Security* remains the lead authority in this area.

On March 5, 2014, in response to a union request, Respondent provided information regarding disciplinary notices, warnings, or records at Red Oak on or after January 13, 2014 (J. Exh. Z at 7; J. Exh. B). Danielle Garrett sent that correspondence to the Union's then-International Representative, Wendell Helms (J. Exh. B). Therein, Respondent offered to bargain over discipline-related issues upon request and offered to bargain an interim grievance procedure while

the parties remained without a collective bargaining agreement (J. Exh. Z at 7; J. Exh. B). The Union, which was still contesting Respondent's refusal to apply the Marshall-Jefferson CBA to Red Oak, did not respond to the offer at that time (J. Exh. A.2; Tr. 239, LL. 1-9).

Respondent continued to provide the Helms with updates as to disciplinary actions issued at Red Oak, but it only did so after the discipline had already issued (J. Exh. Z at 8, 10; R. Exh. 10). The updates pointed out the Union's failure to provide Respondent with a representative the company should contact in the event of potential disciplinary action, and noted that Respondent remained open to bargaining an interim notification and/or grievance procedure for discipline (R. Exh. 10). On August 26, 2016, the Board issued its decision in *Total Security*. Under that decision (discussed in further detail below), employers were obligated to provide notice and an opportunity to bargain prior to issuing discipline. However, Respondent continued to provide only after-the-fact reports.

When David Barker took over as international representative in February 2016, Respondent began sending those letters to Barker, and copying Ducker (R. Exh. 2). On November 14, 2016, the Union, through Barker, sent a letter to Garrett informing her that it had recently come to the Union's attention that Respondent had failed to notify the Union and bargain over discretionary discipline issued to employees at Red Oak (J. Exh. Z at 11; J. Exh. D). The Union demanded that all impacted employees be made whole and requested to bargain over the disciplines Respondent sought to impose "prior to imposing any further action." (J. Exh. D).

On November 17, 2016, Respondent suspended its employee Thomas Smith, pending investigation, without contacting the Union (J. Exh. Z at 12; R. Exh. 11). On November 29, 2016, Respondent notified Smith that he was terminated effective November 17, 2016 (J. Exh. Z at 13; R. Exh. 11; Tr. 65, LL. 17-25, 66, LL. 1-5). Respondent's decision to terminate Smith was

discretionary (J. Exh. Z at 14). Respondent did not inform the Union about Smith's termination until February 7, 2017 (J. Exh. Z, at 17). At no point before the termination was implemented did Respondent notify the Union that it was contemplating disciplining Smith (Tr. 65, LL. 17-25, 66, LL. 1-5).

Respondent replied to Barker's November 14 letter on December 12, 2016 and requested contact information for a Union representative to receive information regarding potential discretionary discipline (J. Exh. Z at 15; J. Exh. E). On December 21, 2016, the Union sent Respondent a letter requesting to bargain disciplinary actions and attaching a chart of past discipline at Red Oak issued between May 24, 2016 and October 31, 2016 (J. Exh. Z at 16; J. Exh. F). Barker, who communicated frequently with management at Red Oak, including Garrett, let her know in person that Respondent should contact Ducker about potential discretionary disciplinary situations prior to implementation (Tr. 216, LL. 21-25; 217, LL. 14-25; 218, LL. 1-25; 219, LL. 1-16). The parties met on multiple occasions, in person, to discuss disciplinary actions taken against Red Oak employees (Tr. 320, LL. 4-24).

On April 3, 2017, Respondent suspended employee Rodney Horn for five days (J. Exh. Z at 23; R. Exh. 13). Respondent did not inform the Union about Mr. Horn's discipline until May 4, 2017, when it sent the Union a letter updating it on past disciplinary actions since April 3, 2017 (J. Exh. Z at 34; J. Exh. V; R. Exh. 14; Tr. 66, LL. 6-14). At no time did Respondent inform the Union it was contemplating suspending Mr. Horn prior to implementing that discipline (Tr. 66, LL. 6-14).

On May 26, 2017, the Union sent Respondent a letter requesting to bargain an interim notification process for discipline for Red Oak bargaining unit employees (J. Exh. Z at 35; J. Exh. W). The parties met for bargaining on June 2, 2017, and executed an agreement providing for the

notification of specific Union officials when Respondent determined that discretionary discipline of an employee was potentially warranted (J. Exh. Z, at 36; J. Exh X).

D. Correspondence and Bargaining Related to Proposed Bond Shop Layoff

In late 2016 and early 2017, Respondent experienced a decrease in anticipated orders from two of its customers (Bell and Gulfstream) that impacted available work in the bond shop and therefore Respondent's staffing needs (J. Exh. Z at 19; R. Exh. 15; Tr. 376, LL. 8-25; 377, LL. 1-25; 378, LL. 1-7). On March 28, 2017,¹ Respondent sent the Union a letter about its tentative plans to reduce headcount in the bond shop at Red Oak (J. Exh. G; J. Exh. Z at 18; Tr. 66, LL. 15-25; 67, LL. 1-15; 176, LL. 2-14). Respondent determined that a layoff might be necessary due to the deceleration of customer orders (Tr. 245, LL. 3-25; 246, LL. 1-25; 247, LL. 1-7). Then-bond shop manager Eileen Rowe had shared that information with Danielle Garrett and expressed that she believed the bond shop would be overstaffed given the upcoming reduction in orders (Tr. 245, LL. 3-21; 385, LL. 13-19). Respondent's letter to the Union indicated that Respondent intended to reduce headcount by between six and fifteen employees (J. Exh. G). The number of employees impacted, according to Respondent, depended upon final determination by the customers (Tr. 248, LL. 17-25; 249, LL. 1-9).

In its letter, Respondent indicated that it was considering a layoff date of April 21 and expressed its willingness to meet with the Union regarding the tentative layoffs and discuss a potential loan agreement to "keep the affected employees gainfully employed." (J. Exh. G). Garrett testified that the April 21 date was based on time the company built in to "have the appropriate conversations with the UAW about the tentative plans for layoff" and determine whether they would agree to an alternative layoff procedure (Tr. 247, LL. 25; 248, LL. 1-16). The

¹ All dates hereinafter are in 2017, unless otherwise noted.

letter indicated that Respondent intended to make selections for layoff based on the status quo RIF policy, which included the RAS system, but that Respondent remained open to an alternative method (Tr. 249, LL. 10-25; 250, LL. 1-3).

The Union responded to Respondent's letter on March 30, accepting its offer to bargain over the anticipated layoff and requesting dates for negotiations as soon as possible (J. Exh. H). Also, on March 30, the Union sent Respondent a request for information pertaining to the proposed bond shop layoff (J. Exh. I). In this request, the Union asked for (1) a list of Bond Shop employees in order of seniority, (2) a list of Bond Shop employees who were not transferees from the other represented facilities, in order of hire date, (3) any disciplinary action Respondent would use in the layoff evaluation process, (4) attendance cards for Bond Shop employees for the period of April 1, 2016 to April 1, 2017, and (5) a list of employees separated by lead for Bond Shop assignments. The Union sought the information on the basis that it was necessary to properly negotiate the potential bond shop layoff to achieve the best outcome possible for potentially impacted employees (Tr. 68, LL. 13-16).

On March 31, Respondent provided some of the information requested by the Union, including the list of bond shop employees in seniority calculation date order; and the list of bond shop employees separated by lead (items 1 and 5 above) (J. Exh. J). Respondent asked for clarification on the Union's request for "[a] list of bond shop employees not transferred to Red Oak from Marshall Street or Jefferson Street that are currently bargaining unit employees, in order of most recent hire date at Red Oak," (item 2 above), stated that it proposed to consider any and all active discipline in response to the Union's request for "disciplinary action the Company will use in the layoff evaluation process for all bond shop employees," (addressing but not fulfilling the request in item 3 above), argued that the Union's request for attendance unit cards for all bond

shop employees (item 4 above) was burdensome, and requested clarification as to why such information was necessary (J. Exh. J). The parties ultimately agreed to negotiate the proposed bond shop layoff on dates already slated for bargaining merit wage increases and certain disciplinary actions (J. Exh. J; Tr. 70, LL. 5-12).

1. April 5 Bargaining Session

The parties first met for bargaining over the proposed bond shop layoff on April 5 at the Hilton Garden Inn in Arlington, Texas, where all related bargaining sessions took place (GC Exh. 2; Tr. 70, LL. 13-18). Barker was unable to attend that session due to a prior commitment, but the remainder of the Union's bargaining committee was present (Tr. 70, LL. 21-24). In terms of the proposed bond shop layoff, the Union first addressed Respondent's deficient response to its information request, explaining that the Union needed timecards for all bond shop employees in order to check the validity of active attendance disciplines that might be taken into account should Respondent ultimately carry out a layoff as proposed (GC Exh. 2 at 2-3; R. Exh. 4 at 3; Tr. 75, LL. 23-25; 76, LL. 1-7).² Respondent did not provide the timecards requested until April 19, two days before employees were laid off (GC Exh. 5 at 2; Tr. 76, LL. 8-13).

After the discussion of the information requests, the discussion then shifted to the proposed bond shop layoff and Respondent's stated interest in a loan agreement as an alternative to layoff

² Garrett testified that Respondent hand records employee absences, including vacation, on attendance cards that are filed alphabetically, thus making the request difficult to comply with quickly. (Tr. 253, LL. 17-25; 254, LL. 1-18). Garrett also testified that the attendance cards would not be used to conduct the RAS rankings, and that only active attendance disciplines would be considered. (Tr. 255, LL. 9-25; 256, LL. 1-2). Garrett conceded that attendance cards could be used to verify the date on which an employee was absent. (Tr. 335, LL. 14-25; 336, LL. 1-2). The status quo RIF policy includes attendance as a core competency for consideration in the RAS procedure, and states:

Follows established attendance standards and reporting procedures, demonstrates promptness (start time, lunch, breaks), completes scheduled shift, works overtime when scheduled.

(J. Exh. A).

(J. Exh. G; GC. Exh. 2 at 4; R. Exh. 4 at 5; Tr. 250, LL. 4-24). Garrett testified that Respondent was interested in a loan agreement in order to avoid a layoff that would mean employees “losing their jobs, hitting the street.” (Tr. 250, LL. 11-24). Ducker asked Garrett if Respondent had a loan agreement proposal (GC. Exh. 2 at 4; R. Exh. 4 at 5). Garrett asked Ducker to step into the hall and informed him that Respondent would like to enter a loan agreement (GC Exh. 2 at 4; R. Exh. 4 at 5; Tr. 262, LL. 22-25; 263, LL. 1-5). The parties discussed the bond shop’s manpower forecast and the potential for temporarily loaning bond shop employees into assembly, 5S,³ or supplementing other job families to keep those individuals gainfully employed (GC. Exh. 2 at 4-5; R. Exh. 4 at 5-7). Ducker asked Respondent for a loan agreement proposal, expressing that the Union would like to see bond shop employees keep their jobs (GC Exh. 2 at 5; R. Exh. 4 at 6-7).

At 9:58 a.m., while the parties were off the record,⁴ Respondent passed a proposed loan agreement to the Union providing that, in lieu of layoff, the Company would loan no more than 20 bond shop employees to other bargaining unit classifications and/or assignments for a period of up to six months; that loaned employees would not have their compensation affected, and that the Company would maintain sole discretion to choose employees to be loaned and to determine which job assignments they would be loaned to (J. Exh. K; GC Exh. 2 at 6; Tr. 78, LL. 6-16; 263, LL. 6-9).⁵ The proposal also provided that if any employee refused to be loaned or to perform the tasks

³ Employees working in 5S engage in various, largely unskilled activities geared towards maintaining order and cleanliness in the facility; such as shadowboxing and cleaning tools (Tr. 76, LL. 25; Tr. 77, LL. 1-8; 265, LL. 1-10).

⁴ Respondent’s notetaker, Wendy Bailey, did not regularly indicate within her bargaining notes when proposals were passed while the parties were off the record (Tr. 355, LL. 17-25; 356, LL. 1-4). The passage of Respondent’s first loan proposal to the Union is one example. Bailey does not state in Respondent’s bargaining notes from that session that Respondent passed the Union its first proposal while the parties were off the record, though it is undisputed that Respondent provided the Union with that proposal on April 5. (R. Exh. 4; Tr. 78, LL. 6-16; 263, LL. 6-9). Another example is Respondent’s April 7 counterproposal, which was also passed off-the-record, but Bailey did not note that fact in her bargaining notes for that day (R. Exh. 6 at 21).

⁵ Garrett testified that the Respondent’s initial document was a “framework for discussion” rather than a formal proposal (Tr. 263, LL. 24-25; 234, LL. 1-8). Respondent’s characterization of the proposal in this manner runs contrary to record evidence and undisputed testimony. Both parties’ bargaining notes indicate that both the Union and Respondent representatives referred to Joint Exhibit K as a ‘letter’ [of agreement], ‘proposal’ and ‘loan agreement,’ and that at no time did Respondent’s representatives correct the Union when identifying the document as

assigned, he would be deemed to voluntarily terminate his employment (J. Exh. K). The parties discussed Respondent's proposal at the end of the April 5 bargaining session, which discussion consisted primarily of the Union committee asking questions of Garrett and Porter related to bond shop work projection, the length of time for the loan agreement, and the potential to train loaned employees in skilled trades in other job families (GC Exh. 2 at 8-9; R. Exh. 4 at 3-5). Specifically, Union committeeman Tommy Bulin asked Respondent what would happen with loaned employees if the dip in bond shop work, or 'bathtub', that Respondent was trying to address through a reduction in force, lasted for longer than six months (GC Exh. 2 at 8; R. Exh. 4 at 4). Porter responded that Respondent would be willing to revisit the letter of agreement and "see what's best." (GC Exh. 2 at 8; R. Exh. 4 at 4). Bulin next asked whether Respondent would be opposed to training loaned employees in assembly rather than completing 5S/lean activities to allow employees to gain knowledge and experience in another skilled trade (GC Exh. 2 at 8; R. Exh. 4 at 4). Porter responded that he did not think Respondent was opposed to doing so, and that they wanted employees to remain gainfully employed and avoid situations in which they would struggle (GC Exh. 2 at 8; R. Exh. 5 at 5). After that discussion, the parties adjourned bargaining for the day and Ducker told Respondent's bargaining committee that the Union would get back to them about their loan agreement proposal (GC Exh. 2 at 9; R. Exh. 5 at 5).

2. April 6 Bargaining Session

The parties met for bargaining the following day and again discussed the proposed bond shop layoff (GC Exh. 3; R. Exh. 5; Tr. 80, LL. 2-10). David Barker arrived for the second session

such. (GC Exh. 2 at 8-9; R. Exh. 4 at 4-5; GC. Exh. 3 at 1, R. Exh. 5 at 2-3). Joint Exhibit K follows the same formatting as all other proposals that Respondent passed during bargaining regarding the proposed bond shop layoff, which include signature lines for both parties, and no indication that the document was a mere framework, and not an actual agreement the Union could enter should it choose to do so (J. Exh. K; J. Exh. M; J. Exh. P). Most importantly, both parties' bargaining notes and record testimony suggest that the loan agreement was passed to the Union as a feasible, active proposal that the Union could have accepted and signed should it have chosen to do so instead of making a counterproposal.

of the day due to a delayed flight (GC Exh. 3 at 1; Tr. 80, LL. 11-17). Early in the first session, committeeman Corey Gregg asked Respondent about the potential for reduced work in other areas of Respondent's operation, and whether any future impacted employees could benefit from the loan agreement (GC Exh. 3 at 1-2; R. Exh. 5 at 2). Garrett indicated that if the need arose to further reduce headcount, the parties could revisit the topic and potentially amend the letter of agreement (GC Exh. 3, at 2; R. Exh. 5, at 2). Gregg also expressed concern with Respondent having sole discretion to choose employees to be loaned given that many managers are not familiar with employees' work history (GC Exh. 3 at 2; R. Exh. 5 at 2). Garrett responded that managers could collaborate, and that Respondent would not be opposed to input from the Union (GC Exh. 3 at 2; R. Exh. 5 at 3).

After a caucus, the parties reconvened with Barker present and the Union gave Respondent a response to its proposed loan agreement (J. Exh. L; GC Exh. 3 at 3; R. Exh. 5 at 1). The Union's response provided that, instead of Respondent having sole discretion to determine who was loaned, it would seek volunteers to loan, make "every attempt to place loaned employees into positions where they may have previous experience or may be successful" and would collaborate with the Union to satisfy the loans (J. Exh. L). Additionally, the response added that should the need arise to increase the number of loaned employees, the parties would meet about adjusting the number (J. Exh. L). Finally, the Union's response provided that if an employee refused to be loaned or to perform the assigned tasks, that individual would be laid off for no longer than six months from the date of the agreement (J. Exh. L). The changes and additions to the loan agreement reflected the parties' discussions on April 5 and 6 related to loans, especially regarding placing employees in positions where they are likely to be successful, and collaboration with the Union.

After receiving the proposal, Garrett asked clarification questions of the Union's bargaining committee (GC Exh. 3 at 3-6; R. Exh. 5 at 1-5). Addressing the provision requiring Respondent to seek volunteers for loan, Garrett asked the Union about a scenario where an employee who volunteered for the loan was needed in his bond shop position (GC Exh. 3 at 3; R. Exh. 5 at 1). Ducker explained it was the Union's position that if those employees who volunteered for the loan were critical to a program, Respondent could keep that individual in his current job (GC Exh. 3 at 3; R. Exh. 5 at 1). Garrett testified at hearing that Respondent sought to loan out employees who did not have active bond shop work, who may not be the employees who volunteered for the loan (Tr. 266, LL. 16-23). Garrett next asked what the Union meant by "may be successful" and "every attempt", and what would happen if employees were not successful (GC Exh. 3 at 3; R. Exh. 5 at 2). The Union responded that Respondent could meet with the Union and managers (GC Exh. 3 at 3; R. Exh. 5 at 2). Garrett expressed concerns about the wording of the Union's proposed letter of agreement, as she believed it left open the possibility that employees could tell Respondent they did not want to be loaned or claim they did not know how to do a job to prevent being loaned (GC Exh. 3 at 3; R. Exh. 5 at 2). Ducker stated the Union was open to a counterproposal from Respondent, and in response to Garrett's concerns, the Union directed her attention to its last bullet point in the proposal, providing that employees who declined to be loaned would be laid off for a period of six months; the timeframe flagged by Respondent as the period of concern for the bond shop headcount (GC Exh. 3 at 3-4; R. Exh. 5 at 2). Garrett expressed her concern that employees refusing to do a job as requested would be rewarded with a job waiting for them after six months (GC Exh. 3 at 4-5; R. Exh. 5 at 3). The Union responded that it would save Respondent money if the employees refused the loan (GC Exh. 3 at 4; R. Exh. 5 at 3). Finally, Garrett asked what the Union contemplated in terms of collaboration to satisfy loans and discussed

what those meetings would look like (GC Exh. 3 at 5; R. Exh. 5 at 4-5). Ultimately, Garrett agreed to get back to the Union on its proposal, expressing the parties' mutual desire not to 'send out' bond shop employees, and said that she believed the parties were "pretty close." (GC Exh. 3 at 6; R. Exh. 5 at 5).

After going off the record, the parties caucused in separate rooms (GC Exh. 3 at 4). During that time, at approximately 1:31 p.m., Bailey and Gil hand-delivered a response to the Union's proposal to the Union in their caucus area near the entrance of the hotel (J. Exh. M; GC Exh. 3 at 6; Tr. 85, LL. 1-14; Tr. 179, LL. 25; 180, LL. 1-5). Respondent's proposal included the same provisions for the loan in terms of timeframes, unchanged compensation, Respondent's discretion to choose employees for loan, and voluntary termination upon refusal, but also incorporated the Union's desire for collaboration; providing that the Company would meet with the Union regarding concerns about a loaned employee and/or the type of work an employee was assigned to try and reach a resolution (J. Exh. M). The proposal also included a provision allowing for collaboration between Respondent and the Union should the need arise to increase the number of employees loaned out (J. Exh. M).

After receiving Respondent's proposal, the Union representatives discussed its provisions for approximately 46 minutes, and at about 2:17 p.m., Garrett, Bailey, and Gil came to the Union's caucus room and informed the Union representatives that Respondent was rescinding its loan agreement proposal and had determined to go forward with a layoff on April 21 (GC Exh. 3 at 6; Tr. 87, LL. 7-21; 181, LL. 17-21; 182, LL. 3-8). The Union's notetaker, Portier, was present for the caucus and wrote in her bargaining notes the time that Respondent passed the proposal, and below noted "Danielle, Wendy, and Jorge came down at 2:17 p.m. to let the Union know that 12 bond and 2 NDI will be permanently laid off and they will have to rescind their loan language.

Will do on the record tomorrow once Danielle learns for sure if that will happen.” (GC Exh. 3 at 6). Respondent’s representatives did not explain to the Union why they were withdrawing the loan proposal, and the Union did not have the chance to discuss Respondent’s latest proposal with Respondent prior before they withdrew it (Tr. 87, LL. 22-25; 88, LL. 1; 162, LL. 18-25; 182, LL. 9-12).⁶ Garrett told the Union that she would rescind the proposal on the record the following day, but that never happened (GC Exh. 3 at 6; GC Exh. 4; Tr. 88, LL. 2-6). Before Respondent withdrew its proposal, the Union reasonably believed the parties were very close to reaching an agreement on the bond shop loans (Tr. 160, LL. 14-24; Tr. 180, LL. 24-25; 181, LL. 1-21).

3. April 7 Bargaining Session

The parties next met for bargaining the following day (GC Exh. 4; R. Exh. 6; Tr. 88, LL. 8-10). With the loan proposal withdrawn by Respondent, along with the announcement that Respondent intended to move forward with the layoff, the Union shifted its focus to other means of ensuring impacted bond shop employees remained employed with Respondent, rather than being laid off, in the form of a transfer to the assembly job family (Tr. 91, LL. 9-15).

⁶ Garrett testified to a different series of events regarding Joint Exhibit M. After being asked whether the parties had follow-up discussions related to that proposal, Garrett testified,

“So the Union, again, they kind of discussed and talked about things in the lobby. We were in our room. You know, the Union was pretty adamant about the volunteers, and we had some off-the-record conversations. Well, basically, I said, “Look, guys. If – if you are going to insist on volunteers, and the Company can’t select, then I don’t know if this loan idea is going to work, and maybe we should focus on something different.”

(Tr. 269, LL. 9-21).

Garrett testified that she did not withdraw the loan proposal because she didn’t have to, and instead suggested that the parties focus on something different that they could agree on (Tr. 269, LL. 22-25; 270, LL. 1-4). Per her normal practice, Bailey did not make note of Respondent’s passage of Joint Exhibit M in Respondent’s bargaining notes, nor did she note that any off-the-record discussion occurred (R. Exh. 5 at 5; Tr. 355, LL. 17-25; 356, LL 1-4). Bailey did, per her normal practice, note the time at which Respondent passed its proposal to the Union on the proposal itself (J. Exh. M; Tr. 355, LL. 17-25; 356, LL 1-4).

In the spirit of this shift, at the beginning of the April 7 session, the Union passed an information request to Respondent pertaining to contractors and bargaining unit employees who had already gone through or were currently in skills training class to perform assembly work (J. Exh. N; Tr. 90, LL. 6-16). The Union requested this information based on its belief that Respondent had moved contractors from the bond shop to assembly, and the Union wanted bargaining unit employees considered for those positions if that was the case (Tr. 90, LL. 17-25; 91, LL. 1-3; 168, LL. 21-25). After the Union gave Respondent its information request, Garrett asked Ducker and Barker clarifying questions to ascertain what information the Union was looking for (GC. Exh. 4 at 2-3; R. Exh. 6 at 2-4). Ultimately, the parties agreed that Respondent would provide the Union with an updated list of any new hires since March 27, and a pay analysis for anybody hired in the assembly department since February (GC Exh. 4 at 3; R. Exh. 6 at 4). The parties also clarified that the Union was requesting that Respondent look through all new hires and determine whether they previously worked in the bond shop, either as an employee or as a contractor (GC Exh. 4 at 4; R. Exh. 6 at 5-6). Garrett confirmed that she had a clear enough understanding to provide the Union with information (GC Exh. 4 at 4-5; R. Exh. 6 at 6).⁷ Respondent never provided the Union with the information requested (Tr. 91, LL. 4-5; 169, LL. 1-10).

The Union passed a proposal to Respondent at 11:14 a.m. regarding the tentative bond shop layoff (J. Exh. O; GC Exh. 4 at 7; R. Exh. 6 at 9). The proposal notes that it comes “[i]n response to the Company notifying the Union on April 6, 2017 that it plans to lay off approximately 12 Bond Shop employees...”, and proposes that in lieu of layoff, Respondent select employees for

⁷ In contrast to what both parties’ bargaining notes reflect, Garrett testified that she did not understand, even after asking the Union questions about its requests at the bargaining table, what the Union was seeking in its information request (Tr. 270, LL. 13-25; 271, LL. 1-15).

transfer to the assembly job classification by seniority, without a change in their compensation (J. Exh. O). For the remainder of the meeting, the parties discussed the Union's proposal and Respondent's questions and concerns. Respondent's main voiced concern was the transfer of employees who earn high wages in the bond shop making the same wage in assembly, where they may not have experience, and Garrett asked for the Union's rationale in that respect. (GC Exh. 4 at 11; R. Exh. 6 at 15, Tr. 274, LL.7-15). The Union responded that the high-seniority employees were valuable to the company, had made a commitment, and that the Respondent should make a commitment to its employees as well (GC Exh. 4 at 12; R. Exh. 6 at 16). The Union also argued that those employees had working knowledge of the company, with minimal cross training on activities within assembly, and are very knowledgeable (GC Exh. 4 at 12; R. Exh. 6 at 16).

During the discussion related to the Union's proposal, David Barker noted; "[w]e started talking yesterday about something yanked out behind us of a short-term, temp (sic) loan – we was working on a lot of things then all of a sudden you're going to have to lay them off." (GC Exh. 4 at 11).⁸ Respondent did not attempt to correct Barker's assertion or inform the Union it was still open to a loan agreement in response, and instead continued talking about a transfer to assembly. (GC. Exh. 4, at 11; R. Exh. 6, at 15).⁹ At the end of the on-the-record portion of the bargaining session, Respondent told the Union it would look at its proposal and formulate a counter (GC. Exh. 4 at 15; R. Exh. 6 at 21). Garrett explained that at that time, Respondent planned on laying off bond shop employees using RAS (GC Ex. 4 at 15; R. Exh. 6 at 21). The parties caucused off the record starting at 11:53 a.m. (GC Exh. 4, at 15).

⁸ Respondent's notes similarly provide: "[w]e started out talking about yesterday that was yanked out behind us as far as I knew on a loan on a short term or temporary type of loan. We were working on a whole lot of different things and avenues and trying to work to that and all of a sudden you're going to have to lay them off..." (R. Exh. 6 at 15).

⁹ At hearing, Garrett testified that Respondent would have entertained another Union proposal related to loans during the April 7 session. (Tr. 272, LL. 10-16).

That afternoon, at approximately 1:35 p.m., David Barker, Tommy Bulin, and Corey Gregg had an off-the-record discussion with Danielle Garrett pertaining, in part, to the possibility of using modified RAS competencies to determine who would be impacted by the proposed reduction in force (GC Exh. 4 at 15; Tr. 184, LL. 24-25; 185 LL. 1-16). The Union's longstanding position on the RAS system was that many of the competency rating categories were far too subjective (Tr. 177, LL. 6-18; 185, LL. 10-25; 186, LL. 1-5).

After their off-the-record discussion, Respondent delivered the Union a counterproposal that attached modified RAS competencies for rating employees (J. Exh. P; 184, LL. 24-25; 185, LL. 1-25; 186; LL. 1-5). Rather than granting employees transfer rights to assembly, as proposed by the Union, Respondent's counter provided that employees would be laid off based on the RAS, using the modified RAS competencies, and those affected could apply for open positions in assembly (J. Exh. P). The counterproposal further provided that employees who accepted an offer of employment in assembly would not have their seniority impacted, would not have recall rights to the bond shop, and would be paid commensurate with their assembly experience (J. Exh. P). The modified RAS competencies eliminated some areas of concern for the Union, but retained others, including teamwork (Tr. 177, LL. 6-18). The Union was also concerned with the inclusion of active disciplines in employee ratings that it had not yet had the opportunity to review or discuss with Respondent (Tr. 186, LL. 6-18).

4. Respondent's April 7 Bond Shop Layoff Communications

On Friday, April 7, at 1:07 p.m., Porter sent an email to Garrett, copying bond shop manager Eileen Rowe and bond shop director Terry Baggett, listing bond shop layoff numbers as seven (7) for April 21, assuming Respondent got its "paperwork complete and clean by then [and fulfilled] bargaining obligations"; and five (5) in June, to be evaluated in mid-May "to validate"

(CP Exh. 1; Tr. 365, LL. 19-25; 366, LL. 1-25; 367, LL. 1-17). Garrett and Rowe had discussed the possibility of conducting two reductions in force as opposed to one, based on timing and headcount patterns (Tr. 362, LL. 5-14). Respondent did not notify the Union that it was considering conducting the layoff in two stages despite the fact that Respondent met with the Union that same day related to the bond shop layoff and would have spoken to Union representatives after receiving the email from Porter (Tr. 364, LL. 11-15; 365, LL. 19-25; 366, LL. 1-25; 367, LL. 1-25; GC Exh. 4 at 15).¹⁰ Garrett testified that Respondent did not inform the Union about the possible two-stage layoff because she “wasn’t considering that” and was told that Respondent was going to lay off twelve bond shop employees, but could not remember the date that Rowe told her this information (Tr. 364, LL. 11-21). When asked about her knowledge of a possible second-stage bond shop layoff in June, Garrett testified that she could not answer that question as she does not set the headcount (Tr. 365, LL. 4-9). Garrett then added “[t]here was a consideration of a couple of different layoffs. I don’t know the timing. Again, that’s – that’s beyond my scope of setting headcount.” (Tr. 365, LL. 11-13).

At 2:27 p.m. on April 7, Rowe sent an email to Garrett and other Respondent representatives, in which she discussed the implementation of a layoff. She informed them that it was time to conduct a ‘rack and stack’ review for bond shop employees and attached spreadsheets with the format for reviews, the rules for rankings, and a list of bond shop employees (GC Exh. 7). The spreadsheets attached included rankings from the previous year that Garrett had sent to Rowe to use as a guide for supervisors and managers conducting reviews in 2017 (Tr. 351, LL. 18-25). Rowe asked the representatives to work on the reviews and look out for a meeting notice for the following week, when they would “put it all together” (GC Exh. 7).

¹⁰ The email in question was sent to Garrett at 1:07 p.m., and the Union’s bargaining notes indicate that Union representatives met with Garrett at 1:35 p.m. (CP Exh. 1; GC Exh. 4 at 15).

On April 13, as part of ongoing discussions related to the need to reduce headcount in the bond shop, industrial engineer Blake Mansfield sent an email to Rowe at 1:03 p.m. with the latest headcount analysis attached pertaining to the Red Oak bond shop (GC Exh. 10; Tr. 387, LL. 17-25; 388, LL. 1-25; 389, 1-2). In that email, Mansfield recommended a reduction of nine full-time bond shop employees, plus two contractors, to equal eleven total heads (GC Exh. 10). About one hour later, Mansfield sent a second email to Rowe, instructing her to let Baggett know that they had to change an assumption about the second reduction and reminding her that they had previously planned on two reductions in force, rather than one, and that the second reduction in force had “wiggle room” in it (GC Exh. 10; Tr. 362, LL. 14-19). Mansfield told Rowe that he did not “see why [Respondent] could not make a reduction to the [reduction in force] at this point.” (GC Exh. 10). The chart attached showed, and Rowe testified, that the forecast showed a need to reduce manpower in the bond shop by eleven, which included two contractors, with further reduction through May (GC Exh. 10; Tr. 389, LL. 3-25; 390, LL. 1-25). The chart does not indicate the precise date on which that reduction needed to occur. Rowe testified that April 21 was the date discussed for implementation, but did not explain how Respondent arrived at that date (Tr. 391, LL. 1-7).

5. Union’s April 14 Letter

In the week following the April 7 session, Respondent’s representative and Union representative Barker were unavailable due to bargaining obligations at Respondent’s Tulsa facility (also represented by the Union) (Tr. 94, LL. 12-20; 188, LL. 25; 189, LL. 1-7; 283, LL. 1-13). During that period, on April 14, the Union sought to keep negotiations moving and sent Respondent a letter in which it responded to Respondent’s latest proposal (J. Exh. Q; Tr. 95, LL. 10-25). In the letter, the Union rejected Respondent’s April 7 proposal, and rejected the proposed

modified RAS competencies, asserting its opposition to the RAS philosophy (J. Exh. Q; Tr. 95, LL. 2-9). With its letter, the Union sought to open the discussion of other layoff alternatives (Tr. 95, LL. 16-25). The Union made another proposal for transfer that included Respondent offering a plant-wide retirement incentive to reduce headcount in the bond shop, bond shop employees impacted by layoff being given the opportunity to apply for open positions in assembly and being made offers at their current rates of pay, and giving impacted bond shop employees recall rights for the 15 months following the layoff (J. Exh. Q). The Union based its proposal for a retirement incentive upon a similar incentive Respondent had offered in the past that had worked well in reducing headcount (Tr. 95, LL. 20-25; 137, LL. 25; 138, LL. 1-16, 188, LL. 12-22).

Garrett testified that she was confused about a few aspects of the Union's letter, but despite her averred confusion, she made no attempt to seek clarification prior to the next scheduled bargaining session on April 19 (Tr. 287, LL. 3-10; 289, LL. 12-17). Respondent did not respond in any manner to the Union's April 14 letter until April 19, when Garrett hand-delivered a letter to Barker rejecting its April 14 "demands" and indicating that Respondent had made a final decision to move forward with its layoff plan for 12 bond shop employees on April 21 (J. Exh. T).

6. April 19 Bargaining Session

The Union and Respondent next met for bargaining over the proposed bond shop layoff on April 19 (Tr. 94, LL. 12-15). One day prior to that session, on April 18, the Union sent Respondent an information request seeking the evaluations of all bond shop employees, the competencies used in those evaluations, the identity of the evaluators of each employee, as well as that of anyone who had input in the employee ratings (J. Exh. R; Tr. 96, LL. 1-11). The Union arrived at the April 19 session prepared to continue negotiating an alternative for layoff in the bond shop, and asked Respondent if it had a response to the April 14 proposal, and information in response to its April

18 information request (GC Exh. 5 at 1; R. Exh. 7 at 1-2). While Respondent did provide the Union with the timecards it had requested on March 30, it did not provide information in response to the Union's April 18 request (GC Exh. 5 at 2; R. Exh. 7 at 2). Respondent did not respond to that request until April 20 (J. Exh. U; Tr. 97, LL. 1-9).

During the April 19 session, the parties discussed the Union's April 14 letter and proposal, and the Union reasserted its desire to continue to bargain about the proposed layoff (GC Exh. 5 at 2-4; R. Exh. 7 at 2-4). The Union reiterated that it was extremely important that the bond shop employees impacted by the reduction in force maintain employment with Respondent (Tr. 99, LL. 21-25). Ducker expressed that the Union believed there was still room for negotiations and proposals to be passed on both sides, and that while the Union was unwilling to agree to the terms of Respondent's last proposal that included modified RAS competencies, it was willing to continue to bargain modified categories that would be acceptable to the Union (GC Exh. 5 at 2-4; R. Exh. 7 at 2-4). Garrett expressed her confusion as to why the Union's April 14 letter stated that the Union is wholeheartedly opposed to the RAS philosophy, but the Union was willing to bargain a modified RAS system for the reduction in force (GC Exh. 5 at 3; R. Exh. 7 at 3). Ducker clarified that the April 14 letter intended to put other ideas in front of Respondent before the layoff was carried out under the initial terms and conditions, given that it appeared that Respondent had already completed employee evaluations and made decisions as to whom it would lay off (GC Exh. 5 at 3-4; R. Exh. 7 at 3-4). Ducker again asserted that the Union stood ready to continue to bargain the reduction in force (GC Exh. 5 at 4; R. Exh. 7 at 4). Garrett replied that the Union needed to clarify the ideas raised in the April 14 letter and, if they wanted to make a proposal, they needed to formulate one and provide it to the company (GC Exh. 5 at 4; R. Exh. 7 at 4-5). Garrett informed the Union that based on its April 14 communication, Respondent had finalized plans to

move forward with the bond shop layoff as scheduled on April 21 (GC Exh. 5 at 5; R. Exh. 7 at 5). Barker protested that assertion, to which Garrett replied that Respondent had made its business decision to move forward with the layoff per the initial terms and conditions of employment, was finalizing the RAS rankings, and had scheduled the process for laying employees off for the following morning (GC Exh. 5, at 5; R. Exh. 7, at 5-6).

Garrett asserted that the Union had ample time to bargain, that the layoff was tentatively scheduled for the following morning, but if the Union had a proposal that could lead to agreement in the “11th hour” the company was willing to entertain it (GC Exh. 5 at 5; R. Exh. 7 at 5-6). In response, Bulin stated that he believed the parties were close on the transfer proposal. He also stated that Respondent had said it was open to a transfer to assembly. Bulin identified the outstanding issue as being only a matter of which employees would be selected and what they would be paid. He stated that the Union believed the parties might not be able to agree on selection criteria before Respondent’s announced stated deadline, but that he did not want to give up on the employees’ right to retain employment through an assembly position (GC Exh. 5 at 5; R. Exh. 7 at 6). Garrett explained that Respondent processed the layoff based on the initial terms and conditions of employment, that it had to do so absent agreement with the Union, and that the initial terms and conditions did not include moving employees from one job family to another (GC Exh. 5 at 5; R. Exh. 7 at 6). Garrett stated that either Respondent was going to go by the initial terms and conditions, or the parties would reach a modified agreement (GC Exh. 5 at 5; R. Exh. 7 at 6). Ducker responded that the Union was absolutely prepared to reach a modified agreement and would stay “as long as it takes” to reach agreement (GC Exh. 5 at 5; R. Exh. 7 at 6). Garrett requested a proposal, as the layoffs were scheduled for 10:00 a.m. the following morning (GC Exh. 5 at 5; R. Exh. 7 at 6).

Ducker requested that Respondent reconsider its timeframe for layoffs, even by a couple of days, to allow the parties to negotiate further (GC Exh. 5 at 6; R. Exh. 7 at 7). Garrett responded that the company believed it was “humane” to let employees know they were being laid off the day before the layoff was implemented, so it planned on informing them the following day (GC Exh. 5 at 6; R. Exh. 7 at 7; Tr. 292, LL. 23-25; 293, LL. 1-4). Ducker expressed that the Union believed it more humane to take the extra days to negotiate and proposed that the parties negotiate for three more days before the layoff was carried out (GC Exh. 5 at 6; R. Exh. 7, at 8). Garrett responded that was not feasible, but when Ducker asked her to explain why not, she did not provide an answer, and instead stated that the Union needed to get the company a proposal rather than worrying about when the company was going to notify employees (GC Exh. 5 at 6; R. Exh. 7 at 8). Garrett stated that Respondent would not consider moving the timing for implementation until it received some idea about whether the parties would reach agreement or not (GC Exh. 5 at 7; R. Exh. 7 at 8).

The Union passed a proposal on the bond shop layoff at 1:14 p.m. (J. Exh. S; GC Exh. 5 at 8; R. Exh. 7 at 1). The proposal provided transfer rights for employees impacted by layoff, who would be chosen per the initial terms and conditions of employment, excluding active discipline if employed at Respondent for less than 48 months, or who had transferred from another facility within the past 48 months (J. Exh. S). The proposal also included that employees transferring to assembly would not have their seniority or pay impacted, would be subject to a 90-day probationary period, and provided for recall rights in the bond shop for the following 15 months (J. Exh. S). The Union explained to Respondent that the proposal excluded active disciplines because the Union believed Respondent was not administering discretionary discipline equitably,

and there were open disciplines that may factor into the layoff decision (GC Exh. 5 at 8-9; R. Exh. 7, at 5).

Garrett expressed concern about Respondent properly evaluating attendance and safety performance without including active discipline (GC Exh. 5 at 9-10; R. Exh. 7 at 2-4). When the Union asked Garrett to clarify how the initial terms and conditions would work if there were no active disciplines for employees, Garrett said that she was not going to get into hypotheticals (GC Exh. 5 at 9; R. Exh. 7 at 3). The Union suggested that Garrett counter with a proposal keeping out safety disciplines or something along those lines, but Garrett continued to ask the same questions regarding the exclusion of active discipline (GC Exh. 5 at 10; R. Exh. 7 at 3). Garrett next took issue with the provision allowing employees to transfer to assembly at their current rate of pay and asked for the Union's rationale (GC Exh. 5 at 10-11; R. Exh. 7 at 4-5). The Union explained that its position was that time spent working for the company should count for something, but that it remained open to negotiating the wages of employees moving to assembly and requested a counterproposal (GC Exh. 5 at 10-11; R. Exh. 7 at 4-6).

Garrett rejected the exclusion of active disciplines in employee evaluations, asserting that Respondent's position was that it absolutely wanted to evaluate employees under the initial terms and conditions of employment (GC Exh. 5 at 12-13; R. Exh. 7 at 6-7). Garrett also rejected the inclusion of recall rights (GC Exh. 5 at 13; R. Exh. 7 at 7; 296, LL. 8-25; 297, LL. 1-3). Garrett testified that Respondent did not want to be obligated to bring back a poor performer, and therefore was unwilling to agree to recall rights for bond shop employees impacted by layoff (Tr. 296, LL. 23-25; 297, LL. 1-3). The Union asked if Respondent would be open to discussing the possibility of allowing bond shop employees who took assembly positions at a lower rate of pay to apply for bond shop positions in the future and, should they be hired into such, retain their former labor

grade and rate of pay (GC Exh. 5 at 13; R. Exh. 7 at 7). Garrett responded that she could not answer that at the time but would be open to possibly applying retroactively any recall rights negotiated into a future collective bargaining agreement (GC Exh. 5, at 13; R. Exh. 7 at 7-8). The Union also asked whether Respondent would entertain a years-of-service multiplier for bond shop employees who took assembly positions, and Garrett responded that it would not, without explanation (GC Exh. 5 at 14; R. Exh. 7 at 8). Bulin asked if they could throw out more ideas, or go off the record, and Garrett replied that she did not believe the parties were anywhere close (GC Exh. 5 at 14; R. Exh. 7 at 8-9). Garrett reiterated that the layoffs were scheduled for the following morning at 10:00 a.m., and urged the Union to let her know if they could not get past the RAS per the initial terms and conditions of employment (GC Exh. 5 at 14; R. Exh. 7, at 8-9). Bulin then asked Garrett if Respondent would entertain a letter of agreement that included a provision that evaluation and discipline subject of the layoff would be open to the grievance procedure with the option of a full remedy available (GC Exh. 5 at 15; R. Exh. 7 at 9). Garrett replied that such was not their obligation under the law (GC Exh. 5 at 15; R. Exh. 7 at 9). Given that Garrett had rejected each of their proposals throughout that session, and the fact that Garrett appeared to be through with bargaining, the Union chose not to modify its proposal (GC Exh. 5 at 16; Tr. 141, LL. 21-25; 142, LL. 1-3).

In response to its April 18 information request, on April 20—the same day that Respondent informed its selected bond shop employees about the layoff—Respondent provided the Union with the bond shop employee rankings and evaluation criteria (J. Exh. U; Tr. 97, LL. 1-22; 105, LL. 1-2). Respondent did not provide the evaluations used to rank employees, but rather, the number rating each received and the ranking that resulted, with the bottom 12 employees being those

ultimately subjected to layoff (Tr. 97, LL. 1-22). Respondent implemented the bond shop layoff on April 21 (Tr. 104, LL. 23-25; 105, LL. 1-6).

7. Post-Layoff Bargaining

The parties continued first contract bargaining the week following the layoff. On April 24, the Union sent Garrett an information request, asking for the discipline files for the 12 employees impacted by the layoff (GC Exh. 12).¹¹ During their April 28 session, the Union gave Respondent two information requests pertaining to the recent bond shop layoff (GC Exh. 11 at 2).¹² The first information request sought information regarding the attendance records of certain individuals for the purpose of discussing their discipline and layoff (GC Exh. 13). In response to receipt of the information request, Garrett inquired about the reference to a layoff, and the fact that the Union was requesting information after the fact (GC Exh. 11 at 2-3). Garrett asserted that her duty was to give the Union notice and an opportunity to bargain, which she believed she had done (GC Exh. 11 at 3).

Garrett also stated that Respondent had provided attendance cards prior to the layoff, and complained that now the Union was deciding it needed more information (GC Exh. 11 at 3). Garrett asserted that the Union was just ‘exercising her’ and making her work for no reason (GC Exh. 11 at 3). Garrett said that the layoff had already been processed, and the Union had sufficient opportunity and notice to bargain and asked how the information being requested impacted the Union’s ability to bargain layoffs that had occurred one week prior (GC Exh. 11 at 3). Ducker responded that Respondent had rated employees on those items, and the Union had a right to see

¹¹ The information request includes a discrepancy in dates; indicating that it was sent on April 24, but that the Union received information on Rodney Horn on May 23 (GC Exh. 12). Respondent does not dispute receiving this information request and agrees that it provided Horn’s information on May 23 (Tr. 415-416).

¹² Garrett testified at hearing that, during first contract bargaining the following week, on April 26, 27, and 28, the Union did not propose to return to bargain issues related to the layoff (Tr. 298, LL. 8-20).

whether the discipline pertained to the layoff (GC Exh. 11 at 3). Garrett then asserted her belief that the information request is indicative of “James’ [Ducker] inherent need to have discipline that was properly given taken away” and that the Union was arguing that Respondent should not have disciplined employees (GC Exh. 11 at 4). Ducker stated that the Union believed there were inconsistencies and needed the information to prove it (GC Exh. 11 at 4).

The Union’s second information request made during that session pertained directly to the rack and stack ratings Respondent had utilized to determine which bond shop employees would be subject to layoff (GC Exh. 13; GC Exh. 11 at 4). Therein, the Union requested “a detailed explanation as to why each Bond Shop employee received the rating they did in each layoff evaluation category,” along with documentation related to those ratings (GC Exh. 13). The Union also requested answers to a few questions related to the evaluation process, including whether those evaluations were completed individually or collaboratively, and whether managers were involved (GC Exh. 13). Garrett stated that she would take under advisement whether or not, or how to respond, and asked clarifying questions (GC Exh. 11 at 4).

Respondent responded to the Union’s April 28 information requests on May 2 (GC Exh. 14). In response to the Union’s first information request, Respondent asked that the Union update its request in an articulate, non-repetitive manner to include necessary detail and a timeframe (GC Exh. 14). The Union sent a follow-up information request in response to this correspondence on May 8, clarifying its requests and explaining that while Respondent delivered attendance cards (unit cards) for the bond shop, it is also requesting all 2016 and 2017 TC-1 documentation, PAR requests (modification of time cards), and FMLA records in order to represent the bond shop employees in discipline and layoff evaluation to understand how discipline is applied to layoff and discipline justification (GC Exh. 15). In response to the second information request, and

specifically, the Union's request for a detailed explanation into each specific rating and documentation, Respondent attached the RAS competencies and explanations thereof, and the employee rankings that it had already provided (GC Exh. 14). Respondent's reply did not include, as requested, any explanation or documentation pertaining to specific employees' ratings (GC Exh. 14).

II. CREDIBILITY

To determine whether Respondent engaged in unfair labor practices as alleged in the Complaint, the Administrative Law Judge must make credibility determinations. The Board gives weight to the ALJ's credibility determination as he "sees the witnesses and hears them testify, while the Board and the reviewing court look only at the cold records." *NLRB v. Walton Mfg. Co.*, 369 U.S. 404, 408 (1962). The ALJ may assess all aspects of the witness's demeanor—including the expression of his countenance, how he sits or stands, whether he is inordinately nervous, his coloration during examination, the modulation or pace of his speech and other non-verbal communication." *Penasquitos Village v. NLRB*, 565 F.2d 1074, 1078-1079 (9th Cir. 1977). Besides these evaluations, "credibility resolutions are also based on the weight of the respective evidence, established or admitted facts, inherent probabilities, and reasonable inferences which may be drawn from the record as a whole." *Shen Lincoln-Mercury-Mitsubishi, Inc.*, 321 NLRB 586, 589 (1996) (citing *Panelrama Centers*, 296 NLRB 711, fn. 1 (1989); *Gold Standard Enterprises*, 234 NLRB 618, fn. 4 (1978), enf. denied on other grounds 607 F.2d 1208 (7th Cir. 1979); *V & W Castings*, 231 NLRB 912, 913 (1977), enf. 587 F.2d 1005 (9th Cir. 1978)).

Many of the facts in this case are undisputed. In those limited areas where factual disputes exist, the ALJ should resolve credibility determinations in favor of the General Counsel's witnesses. The parties dispute whether Respondent withdrew its second loan proposal on the

afternoon of April 6. General Counsel witnesses Ducker and Barker both testified credibly and consistently about the series of events occurring after the parties' April 6 bargaining session, clearly stating that, about 46 minutes after receiving a second loan agreement proposal from Respondent, Garrett, Bailey and Gil returned to the area of the Union's caucus and rescinded the proposal. (Tr. 87, LL. 7-21; 107, LL. 4-13; 181, LL. 17-21; 182, LL. 3-8). The Union's detailed bargaining notes, prepared in real time by notetaker Lindsay Portier, reflect the same series of events, in which Respondent's representatives present the Union with a new loan agreement proposal and return to rescind that proposal shortly thereafter (GC Exh. 3 at 6). As was customary for Portier, as evinced by all bargaining notes she prepared that are in the record in this case, Portier made note of the precise time at which Respondent passed its loan agreement (1:31 p.m.), as well as the time at which it rescinded same (2:17 p.m.). Ducker and Barker both testified that Respondent's representatives did not explain their decision to rescind the proposal, nor did the Union have the opportunity to discuss the proposal with Respondent (Tr. 87, LL. 22-25; 88, LL. 1; 182, LL. 9-12). It was also customary for Portier to make note when off-the-record discussions occurred; but here, she makes no notes indicating discussion about the proposal took place.

Ducker and Barker were consistent in their testimony throughout hearing concerning Respondent's rescission of the loan agreement proposal, even on cross examination. When highlighting the shift in bargaining from a loan agreement to transfers, Respondent's counsel engaged Ducker in the following line of questioning:

Q: To finish my question on April 6th, the parties had a disagreement over the selection issue and that's what led to the stalemate on the loan issue, correct?

A: Her [Danielle Garrett] taking her offer – rescinding her offer changed the situation.

Q: I understand you testified to a rescission but the issue was, the parties had a disagreement about selection.

A: We were in the negotiation process of.

...

Q: Is it your position that as of the afternoon on April 6th, the union still wanted to negotiate over a loan procedure to reduce bond shop headcounts?

A: Until she withdrew her second proposal.

Q: But then the next morning –

A: We were talking – when she withdrew it, we were talking about the proposal that she had given us.

(Tr. 124, LL. 19-25; 125, LL. 1-18).

Additionally, the Union's next proposal included the following introductory provision: "In response to the Company notifying the Union on April 6, 2017 that it plans to lay off approximately 12 Bond Shop employees...at its Red Oak location on or about April 21, 2017, the Company and the Union have agreed to the following..." (J. Exh. O). The fact that the Union's next proposal, Joint Exhibit O, included transfer provisions rather than a loan further supports the Union's assertion that Respondent had rescinded its loan proposal (Tr. 163, LL. 1-10). It makes little sense that the Union would voluntarily move off of a loan agreement proposal where it was decidedly close to agreeing to the terms of the loan agreement as proposed by Respondent (Tr. 160, LL. 14-24; Tr. 190, LL. 24-25; 181, LL. 1-21). Before Respondent passed its second loan agreement proposal, Garrett stated that she believed the parties were close (GC Exh. 3, at 6; R. Exh. 5, at 5). During bargaining on April 7, when the parties were discussing the Union's transfer proposal, David Barker noted; "We started talking yesterday about something yanked out behind us of a short-term, temp (sic) loan – we was working on a lot of things then all of a sudden you're going to have to lay them off." (GC Exh. 4 at 11).

In contrast to Ducker and Barker's clear and consistent testimony related to the loan agreement rescission, Garrett's testimony regarding conversations occurring that afternoon was vague and unclear. When Respondent's attorney asked Garrett what discussions she had with the Union after she provided a second loan agreement proposal to the Union, Garrett replied:

A: So the Union, again, they kind of discussed and talked about things in the lobby. We were in our room.

You know, the Union was pretty adamant about the volunteers, and we had some off-the-record conversations. Well, basically, I said, “Look, guys. If – if you are going to insist on volunteers, and the Company can’t select, then I don’t know if this loan idea is going to work, and maybe we should focus on something different.”

(Tr. 269, LL. 9-21).

Garrett did not provide further detail to support her version of these events. Instead, relying upon her characterization of the alleged off-the-record conversations that occurred, she provided a vague explanation about the Union’s position on the volunteers issue at that time. Garrett testified that she did not withdraw the loan proposal, and instead suggested that the parties focus on something different that they could agree on. (Tr. 269, LL. 24-25; 270, LL. 1-4). Per her normal practice, Wendy Bailey did not make note of Respondent passing Joint Exhibit M, or of any off-the-record discussion that might have followed (R. Exh. 5, at 5; Tr. 355, LL. 17-25; 356, LL 1-4). Garrett’s reference to ‘off-the-record’ discussions related to Respondent’s second loan agreement proposal do not make sense given the time frames referenced in the bargaining notes and the parties’ normal practices. The Union’s bargaining notes reference that Respondent passed its second loan agreement proposal, Joint Exhibit M, at 1:31 p.m., and that Garrett and other representatives returned to the Union’s caucus area at 2:17 p.m., just 46 minutes later (GC Exh. 3, at 6). Garrett testified that it is the parties’ general practice, if a proposal is not already agreed upon, for the parties to caucus separately and discuss the other side’s proposal after it is passed prior to providing a response (Tr. 338, LL. 23-25; 339, LL. 1-11).¹³ Based on that practice, it does

¹³ The parties’ bargaining notes also reflect this practice. After the Union received Respondent’s first proposal related to the bond shop reduction in force, the Union noted at the end of the session that it would get back to Respondent before the parties adjourned for the day, and ultimately provided a counterproposal the following morning. (GC Exh. 2 at 9; GC Exh. 3 at 3). Later that morning, after the parties had discussed the Union’s counterproposal, Garrett told the Union that Respondent would take a look at its proposal, and that she believed the parties were close, but it would just take getting the right language (GC Exh. 3 at 6). Shortly thereafter, at 11:16 a.m., the parties went off the record and caucused, during which time, about two hours later, Respondent delivered its second loan agreement proposal to the Union (GC Exh. 3 at 6). The following day, April 7, the Union passed another proposal related to Respondent’s

not follow that Respondent would have passed a new proposal to the Union and then, after about 46 minutes, return to the Union's caucusing area and engage in off-the-record discussions about the proposal that would then lead negotiations to go in a completely different direction. Instead, the Union's explanation, which is well-documented in its notes, makes more sense.

Based on the credible testimony of two Union witnesses, Ducker and Barker, and the supporting documentary evidence, on the afternoon of April 6, Respondent rescinded its loan agreement proposal and informed the Union that it would be carrying out the bond shop layoff.

Other areas of Garrett's testimony undermine her credibility. During cross examination, Garrett was evasive, and her testimony was, on certain occasions, contradicted by record evidence. For example, when asked by Charging Party counsel whether she ever informed the Union that Respondent was considering conducting the layoff in two stages, Garrett answered that she had not, because she was not considering it, and was told that Respondent was going to lay off twelve bond shop employees (Tr. 364, LL. 7-18). Garrett stated that she and Rowe had discussed laying off twelve bond shop employees, but that she could not remember the date, and testified:

I mean, you are referring to an e-mail that I am not copied on. I don't know what Eileen and Blake talked about, but again, they told me that we needed to reduce twelve heads in the Bond Shop, and that is what I communicated to the Union because that is the information I had.

(Tr. 364, LL. 19-25; 365, LL. 1-3).

When Charging Party counsel then asked Garrett whether it was true that Respondent considered laying off some bond shop employees as late as June 2017, Garrett said that she could not answer that, because she does not set the headcount (Tr. 365, LL. 4-14). When confronted with the April 7 email she received from Porter related to a two-stage layoff, and asked whether

reduction in force at 11:14 a.m. (GC Exh. 4 at 7; R. Exh. 6, at 9). After discussing the proposal, the parties caucused starting at 11:53 a.m., and Respondent later passed its counterproposal during a meeting with the Union that began at 1:35 p.m., about an hour and a half later (GC Exh. 4 at 15).

she was familiar with it, Garrett replied, “[w]ell, it’s to me.” (Tr. 365, LL. 19-24). Garrett admitted that Respondent never informed the Union it was considering conducting the layoff in two stages, because Respondent “did not end up going through with this.” (Tr. 367, LL. 13-25). When confronted with a document that contradicted her previous testimony, Garrett was hostile evasive and vague in her explanations, describing only that Respondent did not tell the Union about this possibility because they did not find it to be relevant, they had discussions, and ended up “[doing] it on April 21” and did not see the point in telling the Union they were not going to do something, despite the fact that the parties met for bargaining that very day, and after she had received the email from Porter. (Tr. 368, LL. 1-8).

Additionally, Garrett testified at hearing that, during, during first contract bargaining the following week, on April 26, 27, and 28, the Union did not propose returning to bargain issues related to the layoff (Tr. 298, LL. 8-20). However, the record evidence shows that indeed, the Union passed additional information requests at the bargaining session on April 28, which were met with hostility by Garrett, who informed the Union that the layoff had already been carried out, and that she did not understand why the Union needed this information after-the-fact (GC Exh. 11; GC Exh. 13). Garrett’s response indicated that Respondent was not open to continuing to discuss a layoff that had already occurred, yet her testimony would suggest that it was the Union that failed to address the layoff in the bargaining sessions that followed.

III. ANALYSIS

A. Respondent implemented the layoff of 12 bond shop employees before the parties reached impasse on that decision and its effects

An employer is generally precluded from changing its employees’ wages, hours, and working conditions without giving its employees’ exclusive bargaining representative notice and a meaningful opportunity to bargain to impasse or agreement concerning the contemplated

changes. See *NLRB v. Katz*, 369 U.S. 736, 743 (1962). An employer's decision to lay off employees for economic reasons is a mandatory subject of bargaining, and in the absence of an agreed-upon contractual provision regarding layoffs, an employer must provide notice to and bargain with the union about the layoff decision and the effects of that decision. See *Bob Townsend/Colerain Ford*, 351 NLRB 1079, 1083 (2007); *Alpha Associates*, 344 NLRB 782, 785 (2005); *Tri-Tech Services, Inc.*, 340 NLRB 894, 894-895 (2003); *Executive Cleaning Services, Inc.*, 315 NLRB 227 (1994); *Holmes & Narver*, 309 NLRB 146, 146-147 (1992). The requirement that management bargain with the union regarding a layoff decision "ensure[s] that the employees' bargaining representative will have the opportunity to propose less drastic alternatives to the proposed layoff." *Lapeer Foundry & Mach.*, 289 NLRB 952, 954 (1988). Alternatives to layoff can include "modified work rules, nonpaid vacations, restricted overtime, job sharing, shortened workweek, and reassignment of work and job reclassifications." *Holmes*, 309 NLRB at 147. The duty to bargain over the decision to lay off employees includes a duty to bargain over the effects of the layoffs. See *Toma Metals, Inc.*, 342 NLRB 787, 787 (2004) (citing *Clements Wire*, 257 NLRB 1058, 1059 (1981)). To ensure meaningful negotiations regarding an economically motivated layoff, the Board scrutinizes the "totality of the [parties'] conduct throughout the course of bargaining..." and requires that negotiations occur quickly upon notification. *Lapeer Foundry*, 289 NLRB at 954 (quoting *Atlanta Hilton & Tower*, 271 NLRB 1600, 1603 (1984)).

In certain cases, extraordinary economic circumstances can excuse an employer's failure to bargain with the union over a layoff decision. See *Bottom Line Enterprises*, 302 NLRB 373, 374 (1991). Economic exigencies that excuse bargaining altogether must be extraordinary events due to unforeseen circumstances that have a major economic effect on the company, requiring immediate action. See *RBE Electronics of S.D., Inc.*, 320 NLRB 80, 81 (1995) (citing *Hankins*

Lumber Co., 316 NLRB 837, 838 (1995)). No extreme circumstances excusing bargaining were presented at hearing in this case, and Respondent does not contend that they exist. In *RBE Electronics of S.D.*, however, the Board articulated a second, lesser economic exigency for situations that are not serious enough to forego notice and an opportunity to bargain altogether but require the employer to provide the union with notice and opportunity to bargain to impasse on that issue, at which time the employer can unilaterally implement its final proposal. *See id.* at 82. Here, Respondent's decision to lay off bond shop employees due to a decline in customer orders required bargaining with the Union to impasse or agreement on that subject. It is undisputed that the parties did not reach agreement regarding the decision to implement the layoff, or its effects. The evidence shows that the parties were not at impasse on the subject when Respondent implemented the bond shop layoff on April 21.

Bargaining impasse exists where "good-faith negotiations have exhausted the prospects of concluding an agreement." *Taft Broadcasting Co.*, 163 NLRB 475, 478 (1967), *enfd. sub nom. AFTRA v. NLRB*, 395 F.2d 622 (D.C. Cir. 1968). To determine whether parties have reached bargaining impasse, the Board considers "[t]he bargaining history, the good faith of the parties in negotiations, the length of the negotiations, the importance of the issue or issues as to which there is disagreement, [and] the contemporaneous understanding of the parties as to the state of negotiations." *Taft*, 163 NLRB at 478. The Board also considers whether the parties demonstrate flexibility and willingness to compromise to reach agreement. *Cotter & Co.*, 331 NLRB 787 (2000) (citing *Wycoff Steel*, 303 NLRB 517, 523 (1991)). The Board, after considering the relevant factors, will find impasse existed only if there is "no realistic possibility that continuation of discussion at that time would have been fruitful." *AFTRA v. NLRB*, 395 F.2d at 628. "Where there is a genuine impasse the parties have discussed a subject or subjects in good faith, and despite their

best efforts to achieve agreement with respect to such, neither party is willing to move from its respective position.” *CJC Holdings, Inc.*, 320 NLRB 1041, 1044 (1996). An impasse exists only where both parties believe they are “at the end of their rope.” *PRC Recording Co.*, 280 NLRB 615, 635 (1986); *Huck Mfg. Co. v. NLRB*, 693 F.2d 1176, 1186 (5th Cir. 1982) (“[F]or a deadlock to occur, neither party must be willing to compromise”). The party asserting impasse as a defense to unilateral action bears the burden of proof on the issue. *North Star Steel Co.*, 305 NLRB 45 (1991), *enfd.* 974 F.2d 68 (8th Cir. 1992). Respondent cannot meet that burden here.

B. Respondent demonstrated a lack of good faith throughout negotiations related to the proposed bond shop layoff

Respondent demonstrated a lack of good faith in bargaining in several ways throughout negotiations pertaining to its decision to implement a layoff in its bond shop. First, Respondent refused to provide information to the Union that was relevant and necessary to bargaining and provided other information too late to allow it to be thoughtfully considered by the Union prior to Respondent’s implementation of the layoff. Second, without explanation, Respondent withdrew its loan agreement proposal after two full bargaining sessions regarding that topic and announced that it would need to carry out a permanent layoff. Third, Respondent imposed an arbitrary deadline for carrying out its bond shop layoff and refused the Union’s requests to continue bargaining prior to carrying out the layoff, without explanation. Finally, Respondent prematurely abandoned bargaining prior to the April 19 session, finalizing its plans to move forward with the bond shop layoff per the initial terms and conditions of employment after receiving the Union’s April 14 letter, and engaged in closed-minded bargaining throughout the April 19 session that diminished any possibility of the parties reaching agreement.

1. Respondent failed to provide the Union with information pertaining to the proposed bond shop layoff and provided other requested information too late for consideration during bargaining

During bargaining and prior to Respondent's implementation of the April 21 layoff, the Union made several information requests directly related to the proposed reduction in force in the bond shop. The Board has found that no genuine impasse in bargaining can be reached where an employer fails to supply information that is relevant and necessary to bargaining, an act that constitutes a failure to bargain in good faith. *See Pertec Computer Corp.*, 284 NLRB 810, 812 (1987). This includes "information needed by the bargaining representative to assess claims made by the employer relevant to contract negotiations." *Caldwell Mfg. Co.*, 346 NLRB 1159 (2006). Furthermore, even where requested information has been supplied, the Board has concluded that genuine impasse cannot be declared, and a final offer implemented, "before the union had a reasonable opportunity to review the relevant information provided to it... and to analyze the impact such information would have on any counteroffers it might make." *Storer Communications, Inc.*, 294 NLRB 1056, 1057 (1989) (describing meaning of Board's earlier holding in *Dependable Maintenance Co.*, 274 NLRB 216 (1985), and 276 NLRB 27 (1985)).

The Union first requested information from Respondent about the proposed bond shop layoff and potentially impacted employees on March 30, after receiving Respondent's letter on March 28. The Union requested: 1) a list of bond shop employees in seniority calculation date order; 2) a list of bond shop employees not transferred to Red Oak from Marshall Street or Jefferson Street who were currently bargaining unit employees, in order of most recent hire date at Red Oak; 3) any disciplinary action the Company would use in the layoff evaluation process for all Bond Shop employees; 4) attendance unit cards for all bond shop employees from April 1, 2016 through April 1, 2017; and 5) a list of employees separated by lead for bond shop employees. The

information requested was clearly relevant to layoff bargaining where Respondent had notified the Union that absent agreement to an alternative method, it intended on carrying out the bond shop layoff per its RIF policy, which included ranking employees per the RAS procedure.

The RAS procedure included consideration of employee discipline in determining rankings. Respondent provided some of this information on March 31, but after the parties discussed the Union's need for the outstanding requests, Respondent did not supplement its response until April 19, just two days before it implemented the layoff, and the same day on which Respondent informed the Union it had made the decision to carry out the layoff per its RIF policy. That response included attendance unit cards for bond shop employees that the Union sought to review for accuracy in connection with employee attendance factored in to their RAS rankings. The date the information was provided made it unrealistic for the Union to properly review in time to allow it to raise any issues at bargaining before Respondent made its decision to inform employees about the layoff the following day and implement the layoff two days later. Furthermore, Respondent never gave the Union a specific response to its request for disciplinary action that Respondent would consider in its RAS evaluation process for bond shop employees, instead providing a general response that all active disciplines would be considered. This omission is especially notable in this case where the Union did not receive notice or an opportunity to bargain about at least one active discipline that was ultimately considered in the RAS ratings that determined who was laid off; the suspension of Rodney Horn. Respondent did not provide the Union with notice of Horn's suspension until after the layoff was implemented, on May 4.

On April 7, the Union requested information regarding employees hired since February that had been through skills training to obtain certifications to perform assembly work, including employees or contractors in the training class who previously worked in the bond shop, their wage

rate at hire, and their present rate and qualifications. The parties discussed the Union's request during bargaining that day, and the Union explained that it needed this information to ascertain whether Respondent had moved contractors from the bond shop to assembly. The Union expressed that it believed bargaining unit bond shop employees should occupy those assembly positions, rather than the contractors. During that session, and after clarification, the parties agreed that Respondent would provide the Union with an updated list of any new hires since March 27, and a pay analysis for anybody hired in the assembly department since February.

This information was particularly relevant given that, after Respondent withdrew its loan agreement proposal, the Union sought to negotiate transfers for impacted bond shop employees to the assembly department. Respondent resisted the Union's proposal to transfer bond shop employees at their current rates of pay, arguing that those employees did not possess the requisite assembly experience to justify keeping their pay rates. The Union sought this hiring and pay analysis information in order to intelligently bargain with regard to its position that employees transferred from the bond shop to the assembly family should not have their pay impacted if Respondent had moved contractors—who may have little or no experience in assembly—from the bond shop to assembly at higher rates of pay. The Union also believed that if contractors had been transferred from the bond shop to assembly, the impacted bargaining unit employees should have the right to those positions. Despite the parties' discussions, mutual understanding as to what information the Union requested, and the clear relevance of the information, Respondent never provided the information. The Union was deprived of information that could have bolstered its bargaining position and allowed it to make a more informed counterproposal during bargaining. It was also prevented from revising certain of its proposals to break any alleged impasse. *See Raven Services Corp.* 331 NLRB 651, 658–659 (2000) (employer's post-impasse, unlawful refusal

to provide requested information prevented union from revising “its proposals in order to break the alleged impasse”).

On April 18, the Union made its final information request prior to implementation of the bond shop layoff when it requested the evaluations of all bond shop employees, the competencies used in those evaluations, the evaluators of each employee, and the identity of anyone who had input on the employee ranking. Respondent did not provide the Union with that information until April 20. Thus, the Employer provided the Union critical information about its selection criteria and employee evaluations on the same day that it notified the employees of their layoff, and one day prior to implementation. *Cf. Raven Services Corp. v. NLRB*, 315 F.3d 499, 505 (D.C. Cir. 2003) (employer’s post-impasse, unlawful refusal to provide requested information broke impasse because union could not revise its bargaining proposals and employer “was artificially perpetuating deadlock”), *enforcing* 331 NLRB 651, 658–659 (2000). This late time frame for providing the information is especially problematic considering Respondent’s managers had already begun conducting its bond shop evaluations and discussing same on April 7 (See GC Exh. 7). Further, Respondent did not provide the Union with the actual evaluations of employees, and instead provided only the numeral attached to each category and the resulting rankings. Additionally, by the time it provided the information to the Union, Respondent had already determined that it would carry out the bond shop layoff per the RIF policy, and notified employees that same day. Thus, providing the Union with the RAS rankings on the date Respondent informed employees about the layoff prevented the Union from analyzing that information properly, challenging its determinations, or formulating a counterproposal concerning the selection process or any other aspect of the layoff before implementation.

From the time Respondent notified the Union of its proposed bond shop layoff to the date of implementation, Respondent failed to provide information to the Union that was necessary for bargaining and provided other information at such time that left the Union with no reasonable opportunity to review and analyze the information and determine whether it would make and how to formulate further counteroffers. Respondent did not provide the Union with attendance cards as requested on March 30, until April 19, the last day the parties bargained the bond shop layoff and the date on which it determined to implement the layoff. This information was readily available and Respondent has failed to demonstrate the reasonableness of its delay in providing it. Thus, the Union did not have sufficient time to review the cards prior to the layoff's implementation on April 21. Respondent never provided the Union with specific disciplinary actions that would be considered in its RAS rankings. Similarly, Respondent did not provide the Union with its bond shop RAS rankings until April 20, the same date on which it informed bond shop employees that they were laid off, leaving it insufficient time to fully analyze and consider prior to the layoff's implementation. Respondent also failed to provide employee evaluations themselves, instead only providing the scores each employee achieved in the RAS categories, and the rankings showing the bottom twelve employees who were subject to layoff. Finally, Respondent failed to provide any information in response to the Union's April 7 request pertaining to employees transferred from the bond shop to assembly, therefore impeding the Union's ability to make further proposals, and undermining its bargaining position. Respondent's failure to provide information in this respect, in addition to other factors discussed below, prevents a finding of impasse.

2. Respondent withdrew its loan agreement proposal while the parties were engaged in bargaining and without explanation

Respondent first proposed a loan agreement with respect to its proposed bond shop reduction in force in the initial correspondence it sent the Union on March 28. At bargaining on April 5, Respondent again indicated it was interested in entering a loan agreement that would allow bond shop employees impacted by a reduction in force to remain “gainfully employed.” The Union echoed Respondent’s desire to keep impacted bond shop workers employed and voiced its interest in a loan agreement early on in bargaining on April 5. The parties then focused all bargaining regarding the proposed reduction in force on a loan agreement for two complete sessions. Respondent provided the Union with its initial proposal for a loan agreement during bargaining on April 5. The Union formulated a counterproposal loan agreement that it gave to Respondent the morning of April 6. Respondent later delivered a second loan agreement proposal to the Union in response to its counter. Just 46 minutes later, Respondent’s representatives rescinded their proposal without explanation, and informed the Union that Respondent would be carrying out a permanent layoff in the bond shop and would no longer consider a loan agreement.

Respondent’s withdrawal of the loan agreement proposal, without explanation, frustrated bargaining and indicated Respondent’s intent not to reach agreement. With its withdrawal, Respondent effectively brought the parties back to where they had started from; with Respondent planning on carrying out the layoff pursuant to its RIF policy. Respondent’s return to its RIF policy for carrying out a reduction in force in its bond shop effectively served as a new starting point for the parties at bargaining, and as a proposal, is regressive. “Regressive bargaining... is not unlawful in itself; rather, it is unlawful if it is for the purpose of frustrating the possibility of agreement.” *U.S. Ecology Corp.*, 331 NLRB 223, 225 (2000) (citing *McAllister Bros.*, 312 NLRB 1121 (1993)). Regressive proposals are violative of the Act when made in bad faith or with the

intent to frustrate bargaining. *See Mgmt. & Training Corp.*, 366 NLRB No. 134, slip op. at 5 (2018) (citing *Quality House of Graphics*, 336 NLRB 497, 515 (2001)). A party's explanation for its regressive proposal need not be persuasive but cannot be "so illogical as to warrant an inference that by reverting to these proposals [the Employer] has evinced an intent not to reach agreement and to produce a stalemate in order to frustrate bargaining." *Hickinbotham Bros. Ltd.* 254 NLRB 96, 103 (1981). However, when a party fails to provide any explanation for its regressive proposal, the Board will find that the party was motivated by bad faith. *See Driftwood Convalescent Hospital*, 312 NLRB 247, 252-53 (1993) (violation where employer failed to provide explanation for its regressive proposal) (overruled on remedy grounds). In this case, Respondent failed to provide any explanation for its withdrawal of the loan agreement proposal at the end of the second day of bargaining. Respondent instead indicated that it would need to carry out a permanent layoff as planned under the RIF policy. Respondent did not tell the Union what the sudden change was, nor did it provide a justification that would explain its altered position. Without explanation, Respondent's actions indicate that it was motivated by bad faith, and that the withdrawal was intended to frustrate layoff bargaining and ensure the parties did not reach agreement.

A parties' withdrawal of a proposal tentatively agreed on will be considered unlawful and designed to frustrate bargaining unless the employer demonstrates that it had good cause for the withdrawal of proposals to which it had previously agreed. *See Valley Cent. Emergency Veterinary Hospital*, 349 NLRB 1126, 1127 (2007) (citing *Suffield Acad.*, 336 NLRB 659 (2001), and *TNT Skypark, Inc.*, 328 NLRB 468 (1999), *enfd.* 208 F.3d 362 (2d Cir. 2000)); see also *Transit Service Corp.*, 312 NLRB 477, 483 (1993). Here, while the parties had not agreed upon a specific proposal or entered any tentative agreement, Respondent and the Union had agreed that a loan agreement was appropriate, given the decline in customer orders reducing work in the bond shop,

and both parties' expressed desire to keep impacted employees employed. At that point, the parties had exchanged only loan agreement proposals. While Respondent's withdrawal of its proposal does not amount to a violation of the Act given the parties had not entered a tentative agreement, it evinces a lack of good faith during bargaining where Respondent failed to offer an explanation to the Union for its abrupt removal of the loan agreement proposal, about which the parties were close to agreeing. Instead, Respondent simply stated that it needed to move forward with a bond shop layoff rather than a loan agreement.

In addition to the withdrawal of its proposal, Respondent also offered shifting explanations regarding the manner in which it sought to carry out the bond shop layoff. At the outset, Respondent indicated to the Union that, absent agreement, it would implement the layoff using the RAS evaluation system under its initial terms and conditions, with the lowest rated employees being laid off. After the Union passed its first loan agreement proposal that included a provision that Respondent would seek volunteers for the loan, rather than giving Respondent sole discretion to decide, Respondent rejected that proposal on the grounds that it wanted to select employees for layoff who were not occupying positions that would be impacted by the period of reduced work in the bond shop due to reduced customer orders. That explanation does not align with the RAS system, which does not consider a specific employee's position; rather, it considers their performance ratings in eight distinct categories. The RAS process dictates that the bottom-ranked employees are those impacted by a reduction in force, without regard to the specific job an employee performs within the bond shop. These shifting explanations discredit Respondent's rejection of the Union's initial loan proposal.

3. Respondent's April 21 deadline was arbitrary, and the parties could have continued bargaining beyond that date

The duty to bargain in good faith includes a duty to refrain from imposing arbitrary deadlines that prevent the other party from fully comprehending or digesting proposals. *See, e.g., Toyota of San Francisco*, 280 NLRB 784, 801 (1986) (duty to bargain in good faith requires that each party have “to digest, understand, and evaluate the other's proposals as they are made, without saddling the other party with artificial deadlines or threats.”). *See also Airo Die Casting, Inc.*, 354 NLRB 92, 111 (2009) (employer violated Section 8(a)(5) by declaring impasse based on self-imposed deadline for cutting pension fund contributions); *Whitesell Corp.*, 352 NLRB 1196, 1197 (2008) (employer violated Section 8(a)(5) by unilaterally implementing provisions of its final offer after imposing arbitrary deadline for negotiations).

From the outset, Respondent imposed a deadline of April 21 for implementing a bond shop layoff and stuck to that deadline throughout subsequent bargaining without providing an explanation to the Union as to why the layoff needed to be implemented by that date. Respondent's first notice to the Union related to a proposed bond shop layoff slated April 21 as a tentative date for carrying out the layoff. At hearing, Respondent introduced evidence showing a decline in customer orders, and therefore a reduced need for bond shop employees in late April. However, the data that Respondent presented do not conclusively show a need to implement the layoff precisely on April 21. (See R. Exh. 15). In fact, as late as April 7, Respondent was considering conducting two layoffs; the first in April and the second in June. (See CP Exh. 1). In that correspondence, Porter indicated that Respondent could lay off 7 employees on April 21, if Respondent completed its paper and “fulfill[ed] bargaining obligations.” (CP Exh. 1). This correspondence indicates that, rather than economically motivated, the April 21 deadline was self-imposed, and reliant upon the fulfillment of bargaining obligations by that date. Respondent never

shared the possibility of a two-stage layoff with the Union, despite being in daily bargaining sessions with the Union from April 5-7.

Additionally, as late as April 13, Respondent's representatives were advised that it was possible to reduce the number of individuals slated for the layoff; and that nine employees and two contractors scheduled for layoff was not necessary at that time (See GC Exh. 10). Respondent similarly never shared this information with the Union, maintaining, since the first correspondence related to the issue, that it would be laying off twelve bond shop employees.

When the Union questioned the necessity to carry out the layoff on April 21, and asked Respondent to delay implementation by a couple of days to allow for further bargaining, Respondent rejected the Union's request without offering an explanation regarding the need to carry out the layoff on April 21 or to justify its refusal. During the parties' last bargaining session related to the proposed bond shop layoff, on April 19, Ducker requested that Respondent delay the layoffs by a couple of days to allow the parties to continue negotiations. In response, Garrett maintained her position that the layoffs were to take place on April 21 and stated that Respondent believed it 'humane' to let employees know they were being laid off the day before the layoff was implemented. Ducker expressed that the Union believed it was more humane to take the extra days to negotiate and proposed that the parties do so for the following three days before the layoff was carried out. Garrett rejected Ducker's request, and stated it was not feasible, but did not explain why.

In *Times Union, Capital Newspapers*, during negotiations for a collective bargaining agreement that included proposed changes to its reduction in force policy, the employer announced to the union that it would be conducting layoffs. *Times Union, Capital Newspapers*, 356 NLRB 1339, 1341 (2011). At a meeting held on March 10, 2009, the employer told the union it needed

to achieve a reduction of 20% in operating costs by the end of the third quarter, which could mean eliminating approximately 20% of the bargaining unit in the next three weeks. *See id.* at 1341-42. At a meeting on June 24, 2009, the employer stated that the parties were at impasse, that the employer was still planning to implement layoffs, and that that meeting started the 45-day notice period. *See id.* at 1343. The employer placed certain employees on a 45-day paid leave, pending layoff, beginning on July 6, 2009. *See id.* at 1344. The employer ultimately declared impasse regarding layoff criteria bargaining on September 11, 2009, and informed employees that their positions were eliminated on that same date. *See Times Union*, 356 NLRB at 1346. The Board affirmed the ALJ's finding that the employer's 45-day deadline was arbitrary, suggesting that Respondent was "establishing a finite time for negotiations regardless of the progress being made." *Id.* at 1353. The ALJ considered that declaration of impasse occurred shortly after the expiration of the 45-day notice period for layoffs, supporting his conclusion that the employer "intended to either have an agreement with the Union or proceed to make layoffs unilaterally in order to comply [sic] self-imposed deadline of effectuating layoffs by the end of the third quarter." *Id.* The ALJ found that the imposition of an arbitrary deadline constituted a factor weighing against a finding of valid impasse on the layoff issue. *See id.* at 1353. Here, as in *Times Union*, Respondent imposed a deadline for bargaining from the outset and stuck to that date regardless of the progress being made in negotiations. Respondent never substantiated its need to carry out the layoff on that precise date and did not offer the Union information to support its conclusion that the layoff must be implemented by April 21.

On April 19, when the Union requested an explanation as to why Respondent could not continue to bargain about the layoff for the following two days, Respondent did not provide one. Respondent's argument that it would be humane to tell employees they were being laid off the day

before the layoff is implemented is unsubstantiated. First, Respondent did not offer an explanation as to why this was more humane and did not respond when the Union offered that it was more humane for the parties to continue negotiations. Second, Respondent's own RIF policy provides that employees may be notified of a layoff and released on the same day. (See J. Exh. A). Even assuming economic circumstances required Respondent to carry out the layoff on April 21, that does not explain Respondent's refusal to delay notification of employees by a day to allow for further bargaining sessions that would give the Union a chance to properly review the information Respondent had provided, formulate new proposals, and perhaps lead the parties to agreement.

Under *RBE Electronics*, the Board does not impose protracted bargaining for circumstances involving "economic exigency compelling prompt action short of the type relieving the employer of its obligation to bargain entirely," but rather, the amount of time and discussion required to meet its bargaining obligation is "dependent on the exigencies of a particular business situation." 320 NLRB at 82. Here, Respondent has failed to establish why the reduction in customer orders necessitating a reduction in bond shop manpower needed to occur precisely on April 21, and why negotiations needed to be finished prior to that date. Respondent's evidence indeed shows a decline in manpower needs around the end of April, but Respondent has failed to show why it refused the Union's request to continue bargaining for the following two days at least. Further, Respondent's ongoing discussion about the possibility of conducting a two-stage layoff or reducing the number of bond shop employees to be laid off, undermines its argument that it was critical that it implement the layoff on April 21.

Respondent's continuous lack of explanation for its proposed April 21 date, correspondence suggesting the number of employees to be laid off could be reduced and a second layoff carried out in June, along with its failure to justify its refusal to delay the layoff by a couple

of days upon the Union's request despite having a provision in the RIF policy allowing for notice and layoff on the same day, taken together, demonstrate that Respondent's April 21 date for implementation of the bond shop layoff was arbitrary.

4. Respondent prematurely abandoned bargaining before the April 19 session, and the Union demonstrated flexibility and willingness to compromise

From the start of the parties' fourth and last bargaining session, Respondent made clear to the Union that it had already made the decision to go forward with the layoff on April 21 pursuant to the RIF policy that it had adopted prior to recognizing the Union and had "finalized plans" for doing so (GC Exh. 5, at 5; R. Exh. 7, at 5-6). Garrett told the Union that Respondent had come to this conclusion as a result of the Union's April 14 letter. In that letter, the Union rejected Respondent's latest proposal from the April 7 bargaining session, and let Respondent know it was opposed to the RAS philosophy. The Union offered counterproposals with methods for carrying out the layoff that would preserve the jobs of impacted employees and reduce the need for a layoff. At bargaining, and at hearing, Respondent expressed its confusion as to the purpose of the letter and the listed proposals therein; however, at no point during the period after receiving the letter on April 14 and the session on April 19 did Respondent reach out to the Union for clarification, or to respond to any of its ideas and proposals. Instead, Respondent moved forward with its final plans to implement the layoff using the RAS without confirming with the Union.

If Respondent's understanding of the Union's intent by its April 14 letter was murky, that understanding should have been clarified during the April 19 bargaining session. On that date, the Union made clear to Respondent from early on that it intended on continuing to negotiate the proposed bond shop layoff, and that it had anticipated Respondent would have a response to its proposals contained in the April 14 letter at that session. Throughout that session, the Union attempted to engage Respondent in bargaining related to the layoff and any manner of keeping

impacted bond shop employees gainfully employed in other job families. However, the Union's efforts on April 21 were consistently met with Respondent's rejection of its ideas and proposals, often without explanation. The Union reiterated that it was extremely important that the bond shop employees impacted by a reduction in force remain employed with Respondent, and that the Union believed there was still time and room for negotiations and proposals on both sides. Garrett responded by stating that the Union had 'ample time' to bargain, and that if the Union had a proposal they could both agree to in the "11th hour", Respondent was willing to entertain it.

Despite having the April 14 letter, Garrett requested a written, formal proposal, which the Union provided. Therein, the Union made significant concessions, including a provision that would allow Respondent to evaluate employees for layoff under the RAS (excluding active discipline) who had been employed for less than 48 months, or who had transferred from another facility within the past 48 months. The Union explained that its proposal excluded active disciplines because the Union was challenging Respondent's disciplinary decisions, and there were open disciplines that the parties had not bargained that may factor into the layoff decision. Garrett responded that Respondent would not be able to properly evaluate attendance and safety performance without including active discipline. Garrett refused to answer when the Union asked how the initial terms and conditions would work if there were no active disciplines, to allow for discussion regarding its proposal. Garrett expressed other issues with the proposal, and the Union encouraged her to provide a counterproposal, but she did not.

In response to Garrett's position on the different aspects of the Union's proposal, the Union provided further ideas to get the parties closer to agreement, including allowing bond shop employees who took assembly positions at lower rates of pay to apply for bond shop positions in the future at their former, higher rate of pay, a years-of-service multiplier for bond shop employees

who took assembly positions, and a letter of agreement providing that the evaluation and discipline subjects of the layoff would be open to the grievance procedure with a full remedy option available. Garrett refused to engage the Union on those suggestions, rejecting them for the purposes of this bond shop reduction in force. She told the Union she did not think they were anywhere close and urged the Union to let her know if they simply could not get past the RAS.

Respondent's announcement towards beginning of the April 19 bargaining session that it intended on carrying out the layoff under its RIF policy established that Respondent was done bargaining, that the layoff pursuant to the initial terms and conditions was decided upon, and that further bargaining would be futile. *See UAW-Daimler Chrysler*, 341 NLRB 431, 433 (2004) (company's announcement of layoff as "done deal" amounted to a fait accompli). Ultimately, the Union's efforts indeed proved futile, with Respondent unwilling to entertain its ideas and proposals, or to make a counterproposal. Even assuming the parties had reached impasse prior to or during the April 19 session, the Union's proposal, that included significant movement, would have broken that impasse. The Board has held that even if impasse is reached over an issue, it may be broken if one of the parties moves off its previously adamant position. *Tom Ryan Distributors*, 314 NLRB 600, 604-605 (1994), *enfd. mem.* 70 F.3d 1272 (6th Cir. 1995) (no impasse found where union demonstrated intent to move on key issue, parties had met only 8 times before employer declared impasse, and the key issue had been discussed conceptually but not in detail). In response, Respondent stuck to its previous position, offered no counterproposal, and refused to engage with the Union when it offered further ideas and proposals. The Union's conduct at the April 19 session is strongly indicative of a lack of impasse, especially its demonstrated concessions and flexibility, voiced desire for agreement, and willingness to extend bargaining for a few more days. *See Grinnell Fire Protection System*, 328 NLRB 585, 585-586 (1999) (no

impasse where employer expressed unwillingness to move from position, union had not offered specific concessions, but had declared its intention to be flexible, sought another bargaining session, and indicated a willingness to involve a Federal mediator), *enfd.* 236 F.3d 187 (4th Cir. 2000), *cert. denied* 534 U.S. 818 (2001). The Board has stated that for an impasse to occur, “neither party must be willing to compromise.” *Id.* at 586. Given the Union’s demonstrated willingness to make further compromises on major issues, Respondent ““might reasonably be required to recognize that negotiating sessions might produce other or more extended concessions.”” *Royal Motor Sales*, 329 NLRB at 772 (quoting *NLRB v. Webb Furniture Corp.*, 366 F.2d 314, 316 (4th Cir. 1966), *enfd.* 152 NLRB 1526 (1965)). Instead, Respondent summarily rejected the Union’s proposals and request to extend bargaining.

The evidence is clear that the parties disagreed about the state of negotiations at the end of the April 19 bargaining session, which weighs against a finding that they had reached impasse. *See Taft*, 163 NLRB at 478. While Respondent voiced that the parties were not anywhere close to reaching agreement, the Union expressed the contrary sentiment, showing its willingness to compromise with concessions and further suggestions that were met with outright rejection by Respondent. Without having received a written counterproposal from Respondent or any indication of their willingness to compromise, and without information it had requested during bargaining, the Union did not make a further counterproposal at that session. However, the Union clearly expressed its willingness to compromise and stay as long as it took to reach agreement. Respondent, in contrast, refused.

5. The length of negotiations weighs in favor of a finding of no impasse

Between Respondent’s initial notification to the Union of the proposed bond shop layoff and its implementation on April 21, the parties met to bargain the proposed bond shop layoff on four occasions; April 5, 6, 7, and 19. At first glance, four negotiations sessions within a three-and-

a-half-week period may be a reasonable number. “While it is true that the number of negotiating sessions is not controlling, generally, the more meetings, the better the chance of finding an impasse.” *PRC Recording Co.*, 280 NLRB 615, 635 (1986). However, when considering the substance of the negotiations themselves, the April 5 and 6 sessions were rendered worthless when Respondent rescinded its loan agreement proposal at the end of the April 6 session. Up until that point, the parties had only discussed and negotiated a loan agreement, per Respondent’s suggestion and asserted preference. The parties spent two full sessions on that subject and exchanged three proposals regarding loan agreements. All that progress, however, was erased when Respondent abruptly and without notice withdrew its loan agreement proposal and informed the Union that it would be moving forward with a permanent layoff in the bond shop. From that point forward, the Union was starting from scratch, knowing that Respondent would no longer consider a loan agreement, and instead pursued a transfer agreement that the parties discussed for the remaining two bargaining sessions. Considering Respondent’s withdrawal of the loan agreement proposal, for practical purposes, the parties only met twice for bargaining regarding the bond shop layoff; on April 7 and 19. These sessions did not involve only layoff negotiations; rather, the parties also discussed other items related to ongoing first contract negotiations. Additionally, Respondent’s conduct in the last bargaining session; April 19, as detailed above, rendered that bargaining session largely unproductive as well. Respondent summarily rejected the Union’s proposals and ideas regarding the bond shop layoff throughout and announced early on that it intended on carrying out the layoff per its RIF policy on April 21 and informing employees on April 20.

The length and number of bargaining sessions pertaining to the bond shop layoff was largely dictated by Respondent. It is undisputed that Respondent was aware of an impending decrease in customer orders as early as late 2016 or early 2017 (J. Exh. Z at 19), however,

Respondent did not inform the Union about its need to reduce headcount in the bond shop until March 28, with a goal date for April 21 for implementing the layoff, just 24 days later. After the three initial bargaining sessions, two of which were rendered null due to Respondent's withdrawal of its loan agreement proposal, Respondent's representatives were unavailable the following week due to scheduled bargaining in Tulsa. While David Barker was also in Tulsa for bargaining, the Union's other representatives were available. During this time, the Union sought to keep bond shop layoff negotiations moving by sending Respondent correspondence with a new counterproposal on April 14. However, the Union heard no response to from Respondent until April 19. At that bargaining session, Respondent informed the Union that it had made the decision to move forward with the layoff pursuant to its RIF policy. It is also noteworthy that the parties only met one other time after the date that Respondent had slated to make a final decision on the layoffs; April 10. (See J. Exh. G).

6. Unremedied unfair labor practices preclude a finding of impasse

The Board has long held that the commission of serious, unremedied unfair labor practices forecloses a finding that impasse has been reached between the parties. *Royal Motor Sales*, 329 NLRB 760, 762 (1999); *Noel Corp.*, 315 NLRB 905, 911 (1994) enf. denied on other grounds 82 F.3d 1113 (D.C. Cir. 1996); *Great Southern Fire Protection*, 325 NLRB 9 (1997). Even assuming the parties here were found to be deadlocked in negotiations, a finding of impasse cannot be reached "in the context of serious unremedied unfair labor practices that affect the negotiations." *Noel Corp.*, 315 NLRB at 911 fn. 33. As will be explored more fully below, Respondent implemented its bond shop layoff in the context of its failure to provide the Union the requisite notice and an opportunity to bargain about discretionary discipline it issued to two employees; Thomas Smith and Rodney Horn. Especially significant is the fact that, ostensibly, the suspension Respondent issued to Horn without notifying or bargaining with the Union was

then factored into the RAS evaluation and ranking that eventually led to his layoff from his bond shop position. Respondent did not inform the Union or provide it with any detail related to Mr. Horn's suspension until May 4, about two weeks after Mr. Horn was laid off. At the time of the layoff implementation, Respondent had not taken steps to remedy this unfair labor practice, nor had it done so regarding the termination of Thomas Smith, which occurred in November 2016. Given that the layoff directly involved the commission of serious unfair labor practices, a finding of impasse cannot be reached.

Taken together, the *Taft* factors relevant here strongly weigh in favor of a finding that the parties were not at impasse when Respondent implemented the bond shop layoff.

C. Respondent failed to bargain to impasse or agreement with the Union regarding its decision to lay off bond shop employees, and therefore a make-whole remedy is appropriate

Respondent was required to provide notice and an opportunity to bargain with the Union regarding both the layoff decision and the effects of that decision. *Lapeer Foundry*, 289 NLRB at 954-955. When an employer fails to bargain over its decision to lay off bargaining unit employees, the Board has held that the appropriate remedy is a make whole remedy that includes reinstatement and backpay for impacted employees from the date of layoff. *See Print Fulfillment Services LLC*, 361 NLRB 1243, 1247 (2014) (citing *Eugene Iovine, Inc.*, 353 NLRB 400 (2008), reaffirmed 356 NLRB No. 134 (2011); *Pan American Grain*, 343 NLRB 318, 318 (2004), enfd. 558 F.3d 22 (1st Cir. 2009); *Wilco Mfg. Co.*, 321 NLRB 1094 (1996); *Plastonics, Inc.*, 312 NLRB 1045 (1993); *Porta-King Building Systems*, 310 NLRB 539 (1993), enfd. 14 F.3d 1258 (8th Cir. 1994); *Lapeer Foundry & Machine*, supra)). However, when an employer fails to bargain about only the effects of an employer's layoff decision, including the selection of employees for layoff, the Board typically orders a *Transmarine* remedy. *See id.* at 1247-1248 (citing *Transmarine Navigation*

Corp., 170 NLRB 389 (1968)). Here, Respondent failed to bargain to impasse or agreement over both the layoff decision and its effects, and therefore, a make whole remedy is appropriate.

Respondent will argue that the Union chose only to bargain the effects of the layoff, rather than the decision itself. This argument fails. From the first bargaining session and throughout those that followed, the Union sought bargaining that would keep bond shop employees gainfully employed by Respondent. Respondent also expressed its desire to keep bond shop employees working, and it was Respondent that first proposed a loan agreement that, instead of sending employees out the door, would keep impacted employees working at their same rate of pay. The Board has listed several issues for discussion between parties that constitute “alternatives to reducing labor costs through use of a layoff” including; “modified work rules, nonpaid vacations, restricted overtime, job sharing, shortened workweek, and reassignment of work and job reclassifications.” *Toma Metals, Inc.*, 342 NLRB 787, 799 (2004) (quoting *Holmes & Narver*, 309 NLRB 146, 147 (1992)). Job reclassification and reassignment are the precise alternatives to layoff discussed by the parties at all four bargaining sessions; beginning with a loan agreement proposal, and after Respondent took that proposal off the table, continuing with a transfer agreement proposal. Garrett herself testified that Respondent proposed the loan agreement as Respondent:

“thought if there were alternatives, instead of laying people off, losing their jobs, hitting the street, could we put them into different work scope within the Red Oak facility that is meaningful and productive to the Company, also reduces the headcount, so eliminates the cost concerns about being overstaffed...”

(Tr. 250, LL. 11-24).

The Union clearly and unequivocally pursued bargaining over the decision to implement the layoff, which included exploring alternatives to layoff; including a loan agreement and transfer.

Respondent cites to *Print Fulfillment Services, LLC* in support of its contention that the Union pursued only effects bargaining and should therefore be entitled to only a *Transmarine* rather than make whole remedy. 361 NLRB at 1247-48.¹⁴ In that case, the Board held that a *Transmarine* remedy was appropriate where the union initially requested bargaining over both the decision and the effects of an announced layoff, but subsequently waived its right to bargain over the decision. 361 NLRB at 1247-48. The Board considered that after the union's initial request to bargain both the decision and its effects, the union expressly sought bargaining only on the effects of the layoff where a union representative testified that the purpose of the bargaining session regarding the layoff was to discuss and bargain over the effects of same, and the union's proposal passed at that meeting specified that the parties had met to discuss procedures to be followed in the reduction of force. *See id.* at 1247-1248, n. 25. In a subsequent email to the company, the representative agreed to meet the following day to bargain the effects of the company's decision to lay off employees. *See id.* at 1248, n. 25. Additionally, in that case, the complaint alleged only that the employer had failed to bargain over the effects of the layoff, and at hearing, Counsel for the General Counsel "explicitly disclaimed" an allegation that the employer failed to bargain over the decision, and affirmed he was only alleging that the employer had failed to bargain over the effects of the decision. *Id.* at 1248. No similar circumstances are present here.

In response to Respondent's notification to the Union that it was contemplating a reduction in force in the bond shop, the Union sent a letter on March 30 accepting "the opportunity to negotiate the anticipated layoffs" and requested dates (J. Exh. H). From the outset of the parties'

¹⁴ Respondent also cites to *Tramont Manufacturing, LLC*, a 2017 decision, in support of its position that a make whole remedy should not apply in this case. *Tramont Manufacturing, LLC*, 365 NLRB No. 59, slip op. (2017). In that case, the regional office dismissed the underlying decisional bargaining case, and the Office of Appeals upheld that decision. *See id.*, slip op. at 1. Thus, neither the ALJ nor the Board was presented with the facts or details concerning the decisional bargaining issue, and no conclusions or determinations were made based on that decision. *See id.* That case is therefore not helpful in determining whether a decisional or effects remedy is appropriate.

first bargaining session on the subject, the Union expressed interest in a loan agreement, as initially proposed by Respondent, in order to keep impacted employees working. At that session Respondent provided a proposal that stated: “in lieu of layoff, the Company may loan not more than 20 bond shop employees to other UAW job classifications and/or assignments associated with continuous improvement/lean activities for a period not to exceed (6) months.” (J. Exh. K). The Union continued to express its interest in a loan agreement, in lieu of layoff, when it provided Respondent with a counterproposal during the parties’ next session. Therein, the Union provided: “in lieu of layoff, the Company may loan not more than 20 bond shop employees to other job classifications and/or assignments associated with continuous improvement/lean activities for a period not to exceed (6) months.” (J. Exh. L).

All discussions during bargaining on April 5 and 6 involved loaning employees to other job families, and manners of ensuring that bond shop employees remained employed with Respondent during the period of reduced work in the bond shop. Even after Respondent withdrew its loan agreement proposal, the Union continued to seek options that would allow bond shop employees impacted by the period of reduced work to remain employed by Respondent, seeking next the transfer of those employees to the assembly department. After the Union’s shift to a transfer in response to Respondent’s withdrawal of the loan agreement, the Union’s next proposal provided: “In lieu of layoff, employees shall be selected in seniority order based off of job classification entry date” and that low senior employees would be transferred to the assembly job classification. (J. Exh. O). Here, unlike in *Print Fulfillment*, the Union never agreed, explicitly or implicitly, to bargain only effects of Respondent’s decision to conduct a bond shop layoff, and focused only on proposals that involved keeping bond shop employees employed with Respondent, “in lieu of layoff”. It follows that a make-whole remedy is appropriate in this case, where

Respondent implemented the bond shop layoff before the parties reached impasse or agreement on the layoff decision.

D. Under extant law, Respondent unlawfully failed to provide the Union notice and an opportunity to bargain over the discretionary termination of Thomas Smith and suspension of Rodney Horn

In *Total Security Management*, the Board held that employers have a statutory obligation to provide a union notice and an opportunity to bargain before imposing discretionary discipline on unit employees when a union has been certified or lawfully recognized as its employees exclusive collective bargaining representative but has not yet entered into a collective bargaining agreement with the employer. 364 NLRB No. 106, slip op. at 2 (2016). The employer's obligation includes providing the union with notice and an opportunity to bargain over discretionary decisions to implement serious discipline, which include actions that impact employees' tenure, status, and earnings, and include suspensions, demotions, and discharges. *See id.*, slip op. at 4. The Board's notice requirement entails "sufficient advance notice to the union to provide for meaningful discussion concerning the grounds for imposing discipline in the particular case, as well as the grounds for the form of discipline chosen" in addition to providing the union with relevant information if a timely request is made. *Id.*, slip op. at 11. The employer is not required to bargain with the union to impasse or agreement at this stage. *See id.* After the employer fulfills its pre-imposition responsibilities, it may implement the discipline, but must continue to bargain about the disciplinary action to agreement or impasse. *See Total Security*, 364 NLRB slip op. at 12.

1. Respondent did not provide the Union notice and an opportunity to bargain over its discretionary termination of Thomas Smith and the discretionary suspension of Rodney Horn

It is undisputed that on November 29, 2016, Respondent notified employee Thomas Smith that he was terminated effective November 17, 2016, after being placed on suspension pending investigation on that date. It is also undisputed that Respondent did not inform the Union about

its decision to terminate Mr. Smith at that time, and that Respondent's decision to terminate Mr. Smith was discretionary. (See J. Exh. Z). Respondent did not inform the Union about its decision to terminate Mr. Smith until February 7, some three months later. Thus, Respondent did not provide the Union with notice and an opportunity to bargain over its discretionary decision to terminate Mr. Smith prior to implementing that discipline.

Similarly, it is undisputed that on April 3, Respondent issued its bond shop employee Rodney Horn a five-day suspension and did not notify the Union about this discipline at that time. It is also undisputed that the suspension issued to Horn was discretionary. Respondent did not provide the Union with notice and an opportunity to bargain over this decision before it disciplined Horn, and did not inform the Union about this discipline until May 4. In the meantime, Horn was laid off pursuant to Respondent's initial terms and conditions of employment, which included a RAS evaluation that took into account all active disciplines, on April 21.

2. The Union did not waive its right to receive pre-implementation notice and an opportunity to bargain over discretionary discipline

The Board recognizes that the principles of equitable estoppel apply to bargaining, and "preclude a party from complaining of a unilateral change in a term or condition of employment where it has, by its conduct, led the other party to reasonably believe that it could deal unilaterally with the subject." *Manitowoc Ice, Inc.*, 344 NLRB 1222, 1223 (2005). Here, the Union did not acquiesce to Respondent's unilateral implementation of discretionary employee discipline. After the Union learned of the *Total Security* decision, on November 14, 2016, David Barker sent Danielle Garrett an email informing her that Respondent had failed to notify and bargain with the Union regarding discretionary discipline of Red Oak employees. In that correspondence, the Union requested that Respondent bargain with the Union if it sought to discipline employees prior to imposing that action. Instead of complying, Respondent continued to send disciplinary

information after that discipline was already implemented. Respondent did respond to the Union's November 14 letter requesting that the Union provide it with a Union representative to receive disciplinary information prior to its implementation. Barker testified that he let Garrett know, in person, that she should inform Union President Ducker. Further, Garrett had Ducker's contact information, including email address and cell phone number, and could provide that information to him via those means. Providing pre-disciplinary notice to Ducker, in order to comply with its *Total Security* obligation to inform the Union about proposed employee discipline prior to implementation, would have taken comparable time and effort as writing disciplinary update letters to the Union.

Respondent argues that under *Windsor Redding Care Center, LLC*, the union was required to make a specific request to engage in pre-implementation bargaining over employee discipline. 366 NLRB No. 127, slip op. at 26 (2018). That case involved events occurring prior to the issuance of *Total Security*, and therefore did not address the requirements therein. *Total Security* imposes no such obligation, and requires an employer to provide the Union with notice and an opportunity to bargain over discretionary, serious disciplinary decisions. See 364 NLRB slip op. at 4.

E. The Board Should Overturn *Total Security*

Although, under extant law, Respondent's actions described above amount to a violation of Section 8(a)(5), the Board should overturn *Total Security Management Illinois 1, LLC* ("*Total Security*"), 364 NLRB No. 106 (Aug. 26, 2016) because the decision is inconsistent with pre-existing Board law, conflicts with Section 8(a)(5) and 8(d) of the NLRA as well as Supreme Court precedent in *NLRB v. Weingarten*, 420 U.S. 251 (1975), and imposes impractical and unworkable bargaining requirements that disrupt business operations and impose obstacles to the negotiation of a first collective bargaining agreement. As Member Miscimarra succinctly stated in his dissent,

the *Total Security* majority decision creates pre-imposition discipline bargaining requirements that “substitute mayhem for . . . longstanding and well-reasoned principles.” 364 NLRB No. 106, slip op. at 32.

In *Total Security*, a Board majority, for the first time in the history of the Act, read its provisions to say that, before a first contract is negotiated by a newly-certified or recognized union, an employer must give that union advance notice of and opportunity to request bargaining over any proposed serious discipline of a unit employee before disciplinary action is taken. In creating this “discipline bar,” as the dissent termed it, 364 NLRB No. 106, slip op. at 17, *Total Security* not only upended decades of established Board and Supreme Court law, and overreached the Agency’s authority, it imposed a complicated and imprecisely-defined, and ultimately unworkable, “bargaining” scheme that suggests that negotiation to impasse is not required (while failing to explain what is required) that provides little benefit to employees, undermines employers’ fundamental rights to maintain order and discipline in the workplace, and improperly imposes contract terms on the parties contrary to Section 8(d). The General Counsel therefore urges the Board to overturn *Total Security* and return to the prior standard, under which an employer who has not changed its work rules or past practice has no duty to provide advance notice of or to engage in bargaining before taking disciplinary action.

1. *Total Security* Contradicts Fundamental NLRA Status Quo Principles.

a. Status Quo Principles

Despite the majority’s suggestion in *Total Security* that its pre-implementation discipline bargaining obligation was of limited and modest scope, the requirement has the purpose and effect of eliminating management’s common law right to make and implement its ordinary disciplinary decisions before any grievance or bargaining request need be entertained. This right, which has

existed for more than a century,¹⁵ would otherwise continue throughout any period of contract negotiations—and most likely beyond—as the vast majority of extant collective-bargaining agreements recognize fully management’s disciplinary rights that *Total Security* so blithely disregards. This bargaining requirement is inconsistent with the employer’s duty to continue to maintain and run its business operations in the same manner after a union has been certified as before. See FRANK ELKOURI & EDNA ASPER ELKOURI, J.D., *HOW ARBITRATION WORKS*, 5-84 to -85 (Kenneth May, ed., 8th ed. 2016) (“[E]mployees must not take matters into their own hands, but must obey orders and carry out their assignments, even when they believe those assignments are in violation of the agreement, and then turn to the grievance procedure for relief.”).

It has long been understood that a labor organization is not an “equal partner in the running of the business enterprise” and has only those rights that it acquires by statute or through collective bargaining. *First Nat’l Maint. Corp. v. NLRB*, 452 U.S. 666, 676 (1981). Although a union undoubtedly has the right to request bargaining over the employer’s disciplinary practices and procedures, as well as to receive notice of and request bargaining over any individual disciplinary decisions effected by the employer, the deliberation and implementation of initial disciplinary determinations are, and have historically been, the prerogative of management.

Thus, contrary to the suggestion in *Total Security*, the Board has never imposed an affirmative pre-implementation bargaining obligation concerning disciplinary matters on an employer who did no more than adhere to the lawful status quo. In *Total Security*, the question was whether an affirmative bargaining obligation should arise from an employer’s routine

¹⁵ *Adair v. United States*, 208 U.S. 161, 175 (1908) (“[I]t cannot be, we repeat, that an employer is under any legal obligation, against his will, to retain an employee in his personal service any more than an employee can be compelled, against his will, to remain in the personal service of another.”); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 45–46 (1937) (distinguishing *Adair* on the basis that “The [A]ct does not interfere with the normal exercise of the right of the employer to select its employees or to discharge them;” “[t]he Board is not entitled to make its authority a pretext for interference with the right of discharge when that right is exercised for other reasons than [intimidating or coercing employees in rights under the Act].”).

application of its pre-certification disciplinary policies and procedures, where those procedures allow it some measure of discretion in determining specific disciplinary outcomes.

It is well-settled that once a union has been certified an employer must maintain the status quo with respect to terms and conditions of employment and that an employer must bargain with its employees' exclusive bargaining representative before implementing changes to employees' terms and conditions of employment. *Katz*, 369 U.S. at 743–44. However, when an employer's actions are consistent with its established policies or past practice, no “change” has occurred under established Board law. *See id.* at 746. Indeed, as Member Miscimarra observed in *Total Security*, the well understood obligation of an employer whose employees have recently voted for a union is emphatically clear: maintain the status quo and apply existing terms and conditions of employment unless notice is first provided to the union and it is given a reasonable opportunity to request bargaining over any “change” proposed. 364 NLRB No. 106, slip op. at 25–26 (Member Miscimarra, dissenting).

It is also well-settled that an employer is required to continue the status quo post-certification with respect to its general business operations. *See, e.g., Lafayette Grinding Corp.*, 337 NLRB 832, 833 (2002) (employer's obligation while bargaining for first contract is to maintain status quo consistent with past practice). Part of the status quo is continuing its business operations, including its pre-certification disciplinary procedures. *See, e.g., Southern Mail, Inc.*, 345 NLRB 644, 646 (2005) (employer unlawfully changed disciplinary policy from virtual nonenforcement to strict enforcement following union's certification and while bargaining for initial contract).

In running a business, an employer makes a myriad number of discretionary decisions. Thus, to continue operating a business in the same status quo manner post-certification as pre-

certification, employers must continue to use discretion in their operational decisions. Personnel actions, such as disciplinary actions, needed to ensure employees are working properly were long considered to be among those non-remarkable discretionary business operations decisions required to be taken to continue status quo, viable business operations. Indeed, prior to *Total Security*, if employers stopped making their usual discretionary disciplinary decisions, such activity would be contrary to the status quo. As Member Miscimarra pointed out in his dissent in *Total Security*, the relevant Board cases after *Katz* not only permitted an employer to follow its regular wage policies and practices, they required it. *See* 364 NLRB No. 106, slip op. at 26 (Member Miscimarra, dissenting), and cases cited therein.

Over the years, the Board has struggled over the issue of whether and to what extent ongoing economic employment practices that involve “a large measure of discretion” in their implementation, such as a merit wage increase, is a “change” warranting notice to the union and requiring pre-implementation bargaining. *See Katz*, 369 U.S. at 746–47 (holding unlawful an employer’s unilateral reduction in sick leave, across-the-board wage increase that was higher than that offered to the union, and merit increases that “were in no sense automatic”); *see also Oneita Knitting Mills*, 205 NLRB 500 (1973). Thus, in *Oneita Knitting*, the ALJ and Board held that, after a union had been certified or recognized, an employer was generally precluded from following the status quo as to merit wage increases, irrespective of whether the union had requested bargaining over wages. 205 NLRB at 500 (citing *Katz*, 369 U.S. at 746).¹⁶ In these cases, employers were precluded from continuing their regular practice of implementing merit wage increases because “the raises . . . in question were in no sense automatic, but were informed by a large measure of

¹⁶ Notably, the Board had seemed to say the directly opposite thing a year before in *General Motors Acceptance Corp.*, 196 NLRB 137, 137 (1972) (that the employer retained “an element of discretion” as to the merit raises given to certain of the covered employees did not prevent its lawful continuation of the program during negotiations with the union).

discretion.” *Katz*, 369 U.S. at 746–47 There was simply “no way in such case for a union to know whether or not there has been a substantial departure from past practice.” *Id.* at 746.

Thus, the Board has developed a body of law in the area of wages and other economic benefits that decisions that change wage rates and other policies and practices where there is no showing of a practice of making such decisions or changes automatically or require a large measure of discretion in implementing the practice are, in fact, changes to the status quo. Whereas, decisions concerning employment policies and practices that do not involve actual changes in policies and practices, but decisions taken within existing policies and practices are not changes to the status quo. The cases cited by *Total Security* applying the concept that a policy or practice that requires a large measure of discretion in implementing such policy or practice is a change to the status quo all concerned implementation decisions of economic policies and practices, such as wage rates, sick leave, and number of work hours. None involved implementation of discipline.

b. Application of Status Quo Principles to Disciplinary Actions.

Prior to *Total Security*, no “change” to the status quo was found to have occurred if the disciplinary action was based on policies or past practices in place at the time the union was elected. *See Fresno Bee*, 337 NLRB 1161, 1186 (2002) (no unlawful change where employer maintained “detailed and thorough written discipline policies and procedures” that predated union; “[t]he fact that the procedures reserve to [the employer] a degree of discretion or that every conceivable disciplinary event is not specified does not alone vitiate the system as a past practice and policy.”), *overruled by Total Security Management*, 364 NLRB No. 106; *Virginia Mason Medical Center*, 350 NLRB 923, 932 (2007) (no pre-implementation bargaining obligation over employer’s decision to terminate employees if terminated under employer’s rules as applied in a manner consistent with past practice).

The cases upon which *Total Security* relies dealt with wages and other economic issues, not discipline. *See Katz*, 369 U.S. at 744–45. The Board’s authority over hiring and firing decisions has long been viewed as more circumscribed, at least where those decisions do not represent interference with statutory rights. Indeed, beyond *NLRB v. Jones & Laughlin*, 301 U.S. 1 (1937), the decided Board and Supreme Court cases make it plain that disciplinary decisions are for the employer, and employees of all stripes are required to follow reasonable rules on company time and premises, and to cooperate in work-related disciplinary investigations. *Terry Poultry Co.*, 109 NLRB 1097, 1098–99 (1954) (permitting employer to discharge employees, for unauthorizedly leaving production line, even though purpose of their departure was to present a concerted grievance to management, adding: “It is not for us to pass judgment on the wisdom of the Respondent in choosing this disciplinary measure instead of another.”); *Cook Paint & Varnish*, 246 NLRB 646, 646 (1979) (employees may be required to participate in investigatory interview), *enforcement denied on other grounds*, 648 F.2d 712 (D.C. Cir. 1981); *Manville Forest Products Corp.*, 269 NLRB 390, 391 (1984) (given employer’s right to demand employee statements in investigation, union steward was engaged in unprotected conduct when he told employees that they need not provide such statements); *NLRB v. Weingarten*, 420 U.S. at 259 (employer has no obligation to bargain with union in the course of investigating and deciding disciplinary issues).

Accordingly, given the long-recognized right of employer discretion in the area of employee discipline, it is not surprising that the doctrine derived from *Katz* and its progeny has never before *Total Security* been applied in disciplinary action cases. Even the majority in *Total Security* was forced to admit that “. . . the Board has never clearly and adequately explained how (and to what extent) this established doctrine applies to the discipline of individual employees.” 364 NLRB No. 106, slip op. at 1.

Rather, Board law has long distinguished between actions involved in administering discipline and actions in changing policies. A distinction has been made between changing disciplinary practices and making decisions under those disciplinary practices. In *Fresno Bee*, the Board rejected the then-General Counsel's arguments that the employer had violated Section 8(a)(5) by taking disciplinary action under disciplinary policies that provided for managerial discretion and making disciplinary decisions that were stricter than before without notifying and bargaining with the union. The Board there held that no change had occurred, stating:

The fact that the procedures reserve to Respondent a degree of discretion or that every conceivable disciplinary event is not specified does not alone vitiate the system as a past practice and policy.

337 NLRB at 1186. *See also Bath Iron Works Corp.*, 302 NLRB 898, 901 (1991); *Trading Port*, 224 NLRB 980 (1976).

Similarly, in *Washoe Medical Center*, 337 NLRB No. 32 (2001), the Board affirmed the ALJ's conclusions that unilaterally setting starting wage rates after a union election was an unlawful implementation of discretionary wage rates, but that a unilateral imposition of discipline was not unlawful. Even though the evidence suggested that some employees were given different levels of discipline, the employer appeared to be following its usual established disciplinary practices. While agreeing with the then-General Counsel that administering discipline is "at least in part, discretionary," the ALJ disagreed that discretion in implementing such policies changed the status quo. Rather, for there to be a violation of the Act, the then-General Counsel must also "demonstrate that imposition of discipline constituted a change in [the employer's] policies and procedures." The cases cited by the General Counsel in *Washoe Medical Center*, like the cases cited in *Total Security*, had nothing to do with discipline, but rather unilateral changes to economic policies and practices such as a reduction in hours and discretionary wage increases.

Total Security's requirement that an employer bargain before implementing discipline against an employee is also contrary to the Supreme Court's decision in *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975). There, the Court held that an employer must permit a union representative to attend an investigatory interview if the employee reasonably believes the meeting could result in discipline, but also stated that "the employer has no duty to bargain" at that meeting. *Id.* at 259. Further, the Court recited multiple times that, if an employee refrains from participating in the investigatory interview, the employer "would . . . be free to act"—i.e., unilaterally decide to impose discipline—based on information obtained from other sources. *Id.* at 259 (quoting *Mobil Oil Corp.*, 196 NLRB 1052, 1052 (1972)); *id.* at 260 (quoting *Quality Mfg.*, 195 NLRB 197, 198–99 (1972)). Significantly, *Weingarten*, which involved disciplinary action taken under a collective bargaining agreement, explicitly held that an employer had no pre-implementation duty to bargain concerning discipline. The Board's imposition of such a requirement in this context would deny management rights to employers that they would otherwise possess if a union had not been certified or if a collective-bargaining agreement had already been negotiated. This bargaining carve-out makes no logical sense and is contrary to Board and Supreme Court precedent.

Requiring an employer to bargain over pre-implementation discipline applied consistent with its past practice would also be inconsistent with the Act, Supreme Court precedent and the Board's dynamic status quo concept. It also disrupts business operations. Thus, for the reasons that have been set forth, the Board should return to the holdings in *Fresno Bee* and *Virginia Mason Medical Center* and long-standing Board precedent in the area of implementation of disciplinary actions and conclude that an employer in the position of Care One does not violate the Act if it fails to notify and bargain with a union prior to disciplining an employee pursuant to its established policy and past practice.

2. The *Total Security* Holding Contravenes Section 8(d) of the Act

The *Total Security* decision improperly imposes contract terms on the parties contrary to Section 8(d) of the Act. The majority in *Total Security* created a “safe harbor” whereby parties, prior to reaching an initial collective-bargaining agreement, could satisfy the majority’s new requirements by implementing an “interim” grievance procedure. 364 NLRB No. 106, slip op. at 9 n.22. However, by establishing a safe harbor premised upon the employer agreeing to particular terms and condition of employment, such as a grievance procedure, the Board ignored Section 8(d)’s express limits on its authority to enforce Section 8(a)(5). Section 8(d) states that the duty to bargain collectively “does not compel either party to agree to a proposal or require the making of a concession.” See *H.K. Porter & Co. v. NLRB*, 397 U.S. 99, 103 (1970) (“The object of this Act [is] not to allow governmental regulation of the terms and conditions of employment, but rather to ensure that employers and their employees [can] work together to establish mutually satisfactory conditions.”). By essentially instructing employers and unions to create an interim grievance system, the *Total Security* majority improperly imposed substantive terms on parties rather than acting in the Board’s proper statutory role as a referee of the bargaining process.

Thus, in addition to its contravention of the NLRA’s status quo principles and Supreme Court precedent, *Total Security* should be overturned on the grounds that it imposes contract terms on the parties in violation of Section 8(d).

3. The *Total Security* Creation of Pre-imposition Bargaining Concerning Disciplinary Action is Practically Unworkable

In addition to shunting aside basic NLRA principles concerning employer actions that are consistent with the status quo, the *Total Security* majority decision has created havoc in the post-certification workplace by imposing staffing requirements on employers and creating a confusing and unworkable bargaining standard before implementation of discipline.

First, prior to *Total Security*, the Board never required that an employer keep on its premises an employee who has engaged in misconduct until a bargaining obligation has been fulfilled. See *Weingarten*, 420 U.S. at 259; *Virginia Mason Medical Center*, 350 NLRB at 923 (although Board requires employers to inform unions of employee rules and standards, there is no requirement to notify union of discipline applied consistent with past practice); *Fresno Bee*, 337 NLRB at 1187 (employers have no obligation to notify and bargain to impasse with union before imposing discipline). See generally *Anheuser-Busch, Inc.*, 342 NLRB 560, 561 (2004) (employees terminated for misconduct based on plant rules not entitled to make-whole remedy), *petition for review denied per curiam sub nom. Brewers and Maltsters, Local Un. No. 6 v. NLRB*, 303 F. App'x 899 (D.C. Cir. 2008). Although *Total Security* also creates an “exigent circumstances” exception, which the majority claimed would allow employers to impose serious discipline prior to bargaining if an employer has a “reasonable, good-faith belief that an employee’s continued presence on the job presents a serious, imminent danger to the employer’s business or personnel,” the majority provided insufficient guidance for employers to determine when this exception applies. 364 NLRB No. 106, slip op. at 9. Further, the majority seems to have narrowly limited the employee conduct to which this exception applies to “unlawful conduct.” Importantly, the *Total Security* majority failed to acknowledge that this exception would not cover the many instances of misconduct that may not rise to the level of unlawfulness that may nevertheless jeopardize production of a safe and profitable product and the safety of the workplace and other employees or result in other liabilities.

Second, the bargaining obligation set forth in *Total Security* is ill-defined and unclear and departs from long-recognized obligations under the Act. “Bargain” is a term of art in labor parlance that means to meet and negotiate to either agreement or impasse. See *United Parcel Service*, 336 NLRB 1134, 1135 (2001) (“It is well established that . . . an employer’s obligation to bargain over

mandatory terms and conditions of employment is not met until the parties either reach an agreement or an impasse in negotiations.” (citing *NLRB v. Katz*, 369 U.S. 736 (1962)). Under *Total Security*, however, the requisite pre-imposition “bargaining” over individual disciplinary actions does *not* entail bargaining to agreement or impasse, but the majority did not delineate what this “less-than” bargaining entails. *See Total Security*, 364 NLRB No. 106, slip op. at 9 (stating no duty to reach impasse or agreement before implementation, but not explaining how much bargaining is needed). This lack of guidance engenders tremendous uncertainty for employers, unions, and employees as to compliance with their legal obligations.

For example, although neither impasse nor agreement is required, it is nevertheless unclear how much pre-implementation bargaining is sufficient before lawful discipline can occur. In addition, if a union causes delay by requesting various kinds of information, it is unclear how long an employer must wait before pre-implementation bargaining can commence. *Id.*, slip op. at 8 (noting that an employer need not bargain to agreement or impasse “if it commences bargaining promptly”). Also unclear is what constitutes the “exigent circumstances” that would privilege the employer to immediately implement needed discipline. *Id.*, slip op. at 9 (creating only a loose “reasonableness” standard for the exigent-circumstances exception). Additionally, the lack of guidance from the Board makes employers that “engage[] in some discussion, but d[o] not yield to the union’s demands,” susceptible to a claim of surface bargaining. *See id.*, slip op. at 32 (Member Miscimarra, dissenting) (quoting *First Nat’l Maint. Corp. v. NLRB*, 452 U.S. at 685). The *Total Security* majority’s vague description of its pre-imposition bargaining scheme is all the more problematic considering that swift and resolute action is imperative once an employer has determined that an employee has engaged in serious misconduct warranting discipline.

4. Overturning *Total Security* Does Not Deprive Employees of Any Rights

In addition to creating significant confusion, *Total Security*'s novel standard created new employee and union rights that provide them with no greater benefits than already exist. Because employers may not ignore their employee representative's request to discuss any kind of workplace issue, there has always been negotiation of individual employee discipline, including prior to the action being effected. And, under well-established Board law (which did not change under *Total Security*), employers must bargain to agreement or impasse *after* imposing discipline, if requested by the union, where no grievance-arbitration procedure is in place. *See, e.g., Ryder Distribution Resources*, 302 NLRB 76, 90 (1991) (employer unlawfully refused to engage in post-implementation bargaining over four employee terminations where union expressly requested bargaining at a time when parties were bargaining for initial collective-bargaining agreement). That is, a union may be able to reverse an employer's disciplinary decision and obtain reinstatement of a discharged employee through post-implementation bargaining, and where an employer fails to engage in such post-imposition bargaining in good faith, the Board will issue a bargaining order. *See id.* at 76, 91–92.

Thus, because there has always been a post-implementation bargaining obligation, which still exists, employees would not lose any of the rights or remedies they have always possessed under the Act by returning to a pre-*Total Security* standard. Accordingly, when balancing the interests of employers in maintaining orderly workplace operations against the little, if any, advantage to employees in requiring employers to engage in pre-implementation "bargaining," the balance favors employers' interests.

5. *Total Security Undermines an Employer’s Right to Maintain Order and Discipline in the Workplace*

Imposing a confusing requirement that entails something less than negotiating to impasse or agreement, and great uncertainty, certainly does not warrant imposing new burdens on employers’ long-recognized need to maintain order and discipline in the workplace. When an employee engages in serious misconduct warranting discipline, employers must act decisively to maintain order, production, and discipline in the workplace. *See Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 797–98 (1945) (stating that employers have an “undisputed right . . . to maintain discipline in their establishments”); *Star-News Newspapers, Inc.*, 183 NLRB 1003, 1004 (1970) (“The Act’s grant of rights to employees to engage in organizing activities, to belong to a union, and to engage in collective bargaining was not intended to deprive management of its right to manage its business and to maintain production and discipline.”). In addition, employers are subject to a myriad of federal and state statutes governing the workplace, in addition to the NLRA, which require employers to ensure that employees are provided a safe and harassment-free work environment. For example, the EEOC advises employers to prevent workplace discrimination by adopting a strong anti-harassment policy that includes “[a]ssurance that the employer will take **immediate and appropriate corrective action** when it determines that harassment has occurred.” *See Best Practices for Employers and Human Resources/EEO Professionals: How to Prevent Race and Color Discrimination*, <https://www.eeoc.gov/eeoc/initiatives/e-race/bestpractices-employers.cfm> (last visited Feb. 22, 2019) (emphasis in original). *See also Curry v. District of Columbia*, 195 F.3d 654, 660 (D.C. Cir. 1999) (per curiam) (“An employer may be held liable for the harassment of one employee by a fellow employee (a non-supervisor) if the employer knew or should have known of the harassment *and failed to implement prompt and appropriate corrective action.*” (emphasis added)). *Cf. Fresenius USA Mfg., Inc.*, 362 NLRB 1065, 1065 (2015)

(acknowledging employers' legitimate business need to prevent harassment). Some industries, such as the health-care industry at issue in the instant case, require particularly swift action because lives are literally at stake. *See Washoe Medical Center*, 337 NLRB at 204 n.3 (listing offenses under health care employer's disciplinary code, including "abuse of patients and other personnel," "reporting for work while under the influence of proscribed substances," "falsification of records," and "refusal to care for patients").

Accordingly, the Board should overturn *Total Security's* holding that employers must provide notice and an opportunity to bargain prior to implementing specific discipline on particular employees before the parties have reached an initial collective-bargaining agreement. *Total Security* flies in the face of well-settled and well-understood Board law concerning unilateral actions consistent with the status quo; provides insufficient guidance on how parties are to "bargain" without an obligation to negotiate to impasse or agreement; provides little, if any, benefit to unions and employees that would outweigh employers' interests in workplace safety and discipline; and unduly burdens employers' fundamental right to maintain order, production, and discipline in the workplace. The Board should return to the prior holdings of *Fresno Bee* and *Virginia Mason Medical Center*.

6. Application to the Instance Case

Under pre-*Total Security* law, an employer had no duty to provide the union with pre-imposition notice and an opportunity to bargain regarding the disciplines of the two employees at issue here. Here, the Union did not reach out to Respondent regarding its offer to implement an agreed-upon procedure for notifying the Union about disciplinary decisions until May of 2017. Accordingly, the related portion of the Complaint should be dismissed.

IV. CONCLUSION

For all of the reasons advanced above, the General Counsel respectfully requests a finding that Respondent violated the Act as alleged in the Complaint. The General Counsel also respectfully seeks the traditional reinstatement, a make whole remedy and order (including backpay, with interest), a cease and desist Order, and a Notice Posting. The General Counsel further seeks all other relief as may be deemed appropriate to remedy the unfair labor practices alleged.

DATED at Fort Worth, Texas this 14th day of June, 2019.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the above and foregoing Counsel for the General Counsel's Brief to the Administrative Law Judge has been served this 14th day of June 2019, via electronic mail upon each of the following:

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